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BEYOND INTENTION

*Kimberly Kessler Ferzan**

Even a dog distinguishes between being stumbled over and being kicked.

—O. W. HOLMES, JR., *THE COMMON LAW* 3 (1881)

INTRODUCTION

Intentions play a central role in our moral and legal discourse. As Justice Holmes famously remarked over one hundred years ago, the intention with which we act is fundamental to our attributions of blameworthiness. It is intention that distinguishes a stumble from a kick.¹

Moral and legal rules often turn on whether the actor intended to cause a particular harm. For instance, the Catholic Church's position on the termination of a pregnancy in order to save the mother's life turns on the Doctrine of Double Effect (DDE). Under the DDE, one may not justify an intended harm with good consequences, but may justify, with such consequences, a harm that is only foreseen.² Thus, a medical procedure that only knowingly kills a fetus is not an abortion, while a

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¹ There are three "aspects" of intentions. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 117-18 (1968). Antony Duff explains:

We talk, first, of *bare intentions* which have not yet been put into action: I intend to go to Glasgow tomorrow, but have as yet done nothing about it. We talk, secondly, of *intentional actions*—of doing something intentionally or with the intention of doing it: I buy a ticket to Glasgow intentionally or intending to do so. And we talk, thirdly, of *further intentions* with which an agent acts—of the ends towards which her present actions serve as means or preparation: I am going to Glasgow for the purpose of visiting my aunt.

R.A. DUFF, *INTENTION, AGENCY AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW* 38 (1990).

² See MICHAEL E. BRATMAN, *INTENTION, PLANS, AND PRACTICAL REASON* 140 (1999) (discussing the effect of the DDE).

procedure that is aimed at killing the fetus is an abortion and is impermissible.³

Criminal law also relies on the concept of intention. First, many state and federal statutes require that the defendant act with a specific intention. One can only attempt murder if she intends to kill another. One can only conspire if she intends to agree. One can only solicit if she intends for another to commit a crime. Second, we may also think that agents who aim at wrong, as opposed to simply accepting it, are more culpable. Indeed, the American Law Institute's influential Model Penal Code distinguishes between purpose and knowledge.⁴

More generally, the criminal law must answer classification questions that rely on the jury's ability to discern the actor's intention.⁵ When Alex steals Betty's car, the jury must find that Alex's intention ("to steal the cool red car") was an instance of the type of intention forbidden by the statute (taking the property of another). When Carol intends to shoot Debra in the left eye, but misses and hits the right, the jury must determine whether Carol did what she intended. Every time a jury must determine whether the defendant acted with a forbidden mental state or whether the defendant proximately caused the harm she intended to, the jury is engaged in one of these classificatory enterprises.

Of course, with so much resting on the concept of intention, one would hope we understand the concept itself. More specifically, do we know when someone *intends* to cause a harm? At first glance, the answer seems uncontroversial.⁶ Something is intended if it is

³ This position is not without its critics. See Terrence Reynolds, *Moral Absolutism and Abortion: Alan Donagan on the Hysterectomy and Craniotomy Cases*, 95 ETHICS 866, 867-68 (1985).

⁴ See MODEL PENAL CODE § 2.02(2) (2006).

⁵ See Michael S. Moore, *Patrolling the Consequentialist Borders of Our Obligations*, LAW & PHIL. (forthcoming 2007) (manuscript at 16-19); see also *infra* Part II.B.

⁶ The metaphysical status of intention is controversial, but it is indisputable that intention is relevant to the meaning of actions and this relevance exists independent of whether one views intention either as a metaphysical state or as part of language games.

The relationship between intentions and beliefs and desires is also complex. An intention is not simply a belief that *x* will occur and a desire for *x* to occur as the result of one's action. Rather, one must perform the action *for x* to occur. DUFF, *supra* note 1, at 57. Thus, to employ Antony Duff's example, one may give an annoying student a failing grade because of poor exam quality, and both know and delight at the fact that the student will suffer, yet not give the grade to cause the suffering. *Id.* The linkage between beliefs and desires and intentions and actions is complicated. First, one may have a desire for *x* and believe that *y* will yield *x*, yet never form the intention or perform the action *y*. DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* 77 (2d ed. 2001). Conversely, one may have the belief/desire set for *y* and perform *y*, yet not have the belief/desire set proximately cause *y*. That is, to borrow Donald Davidson's example, a climber may want to rid himself of another man by loosening his hold on the rope, and "[t]his belief and want might so unnerve him as to cause him to loosen his hold, and yet it might be the case that he never *chose* to loosen his hold, nor did he do it intentionally." *Id.* at 79. For our purposes, nothing turns on these intricacies.

motivationally significant. For example, for Elizabeth Anscombe, intentional actions are responsive to the question “why?”⁷ Antony Duff claims that we intend a result when we act “in order” to achieve that result.⁸ Michael Bratman argues that a result is intended if one plans to achieve that result—if one engages in means-end reasoning about how to bring about the result, screens out alternative intentions inconsistent with the result, and endeavors to bring about the result.⁹ This requirement of motivational significance takes various forms but, in essence, represents one view of intention.¹⁰

Hence, the easy distinction is between harms that are intended and those that are unintentional.¹¹ While every action is intentional under some description,¹² an actor properly rejects that her action is intentional under a description where she is not aware of the relevant facts.¹³ For instance, if Alice and Betty are eating dinner together, Alice may intend to pick up a water glass, but not realize that the glass is Betty’s. Alice will admit that she intended to pick up a water glass, but deny that her action was intentional under the description “picking up Betty’s water glass.”

The more difficult issue is the correct treatment of *known* descriptions that the actor denies had any motivational significance. Does one intend for one’s drapes to fade if one places them in sunlight?¹⁴ What of the sniper who shoots at a soldier, thereby heating

⁷ G.E.M. ANSCOMBE, *INTENTION* 11 (1957) (“Intentional actions are ones to which a certain sense of the question ‘why?’ has application.”).

⁸ DUFF, *supra* note 1, at 58, 61 (advocating the “test of failure”—a result is intended if the action fails if that result is not achieved).

⁹ BRATMAN, *supra* note 2, at 140-43 (rehearsing the trio of roles that intentions play).

¹⁰ See also Anthony Kenny, *Intention and Purpose in Law*, in *ESSAYS IN LEGAL PHILOSOPHY* 146, 148 (Robert S. Summers ed., 2d ed., 1976) (“To somebody who is not a lawyer, it might seem that there was a further question relevant to Smith’s intention: not only what he foresaw, but what he wanted.”); A.P. Simester, *Moral Certainty and the Boundaries of Intention*, 16 OXFORD J. LEGAL STUD. 445, 446 (1996) (“Bluntly stated: things done as means or ends are intended; those done as side-effects are not.”); John Finnis, *Intention and Side-Effects*, in *LIABILITY AND RESPONSIBILITY: ESSAYS IN LAW AND MORALS* 32, 36 (R.G. Frey & Christopher W. Morris eds., 1991) (“Whatever, then, is included within one’s chosen plan or proposal, whether as its end or as means to that end, is *intended*, i.e., is included within one’s intention(s).”) (emphasis in original).

¹¹ One semantic difficulty here is that there is a conceptual distinction between intending to cause a harm and causing a harm intentionally. I mean only to focus on what one intends and not what one does intentionally. The latter is arguably a broader category. See BRATMAN, *supra* note 2, at 142; see also VICTOR TADROS, *CRIMINAL RESPONSIBILITY* 222-225 (2005) (arguing that we use “intentionally” to “mark out the fact that [the harm was] significant within the psychology of the agent”).

¹² DAVIDSON, *supra* note 6, at 46-47 (stating that an event is an action if, under some description, it is intentional). But see A.P. Simester, *Paradigm Intention*, 11 LAW & PHIL. 235 (1992) (discussing “habitual” conduct that, although not intentional under any description, we would still count as an action).

¹³ ANSCOMBE, *supra* note 7, at 11 (“[I]t is important to notice that a man may know that he is doing a thing under one description, and not under another.”).

¹⁴ Finnis, *supra* note 10, at 46.

the barrel of his gun—does he intend to alert the enemy of his presence?¹⁵ When the actor knows a result is certain, does the actor also intend that result? Because of the lack of motivational significance, many theorists contend that foreseen side effects are not intended.¹⁶

Yet, even for those theorists who view foreseen side effects as not intended, there is the problem of how to square this presupposition with the problem of “inseparable effects.” A range of imaginative hypotheticals illustrates the problem. Glanville Williams presents the surgeon who wishes to remove his patient’s heart completely, his only motivation being to experiment on the heart. The surgeon does not desire his patient’s death, although he recognizes death as a certain result.¹⁷ An intended killing? Robert Audi imagines the restaurant patron who intends to order lobster tails, knowing, but not caring, that they are the most expensive item on the menu.¹⁸ Is it true, as Audi claims, that the patron does not intend to order the most expensive thing on the menu?¹⁹ What of Lord Bridge’s hypothetical in *R. v. Moloney*, where a man boards a plane to escape police?²⁰ The riddle asks: if the man boards the plane, and it is bound for Manchester, does the man intend to go to Manchester?²¹

While these hypotheticals may seem fanciful, the implications for criminal law are quite real. Consider the following adaptations of the lobster problem. First, Albert decides to kill Betty, but he misses and hits Carla. The response of the criminal law is to *transfer intent*. That is, the intention to kill Betty is said to transfer to the death of Carla. However, some theorists argue that because Albert intended to kill a *human being*, we need not conceptualize this as *transferred intent*.²² After all, the intention to kill Betty is the intention to kill a human being, and that is all that the statute requires. Indeed, even if Albert had

¹⁵ GILBERT HARMAN, REASONING, MEANING, AND MIND 65 (1999).

¹⁶ Bentham’s approach is to dub foreseen side effects as instances of “oblique intention,” and Duff claims the foreseen result is “intentional” but not “intended.” JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 200-21 (1948); DUFF, *supra* note 1, at 79-80. A few philosophers include foreseen side effects within the penumbra of intention itself, and some courts concur. See, e.g., RODERICK M. CHISHOLM, PERSON AND OBJECT: A METAPHYSICAL STUDY 75 (1976); HENRY SIDGWICK, THE METHODS OF ETHICS 60, 202 (Hackett Publ’g Co. 1981); *Hardy v. Motor Insurers’ Bureau*, 2 Q.B. 745, 765 (1964); *DPP v. Smith*, [1961] A.C. 290. The Model Penal Code distinguishes purpose from knowledge in its mens rea terms, but the Code rarely distinguishes between the two for its definitions of statutory offenses. See MODEL PENAL CODE § 2.02(2)(a)-(b) (2006).

¹⁷ GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 39 (2d ed. 1961).

¹⁸ Robert Audi, *Intending*, 70 J. PHIL. 387, 396 (1973).

¹⁹ *Id.*

²⁰ *R. v. Moloney*, [1985] A.C. 905, 926 (H.L.).

²¹ See also HART, *supra* note 1, at 120 (considering whether, if an actor strikes a glass violently to hear the sound, the certain breakage is intended).

²² JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 109 (2d ed. 1995); Michael Moore, *Intentions and Mens Rea*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY 245, 267-68 (Ruth Gavison ed., 1987).

hit Betty, it would be his intention “to kill a human being” and not “to kill Betty” that would be legally relevant. Thus, we can classify Albert’s intention as that prohibited by the law. Notice that in this instance, despite the fact that Betty’s status as a human being may not be motivationally significant to Albert, he is nevertheless held to intend to kill a human being.

Now compare David who kills Earl, whom David knows to be an African-American. By the logic above, when David intends to kill Earl, David thereby intends to kill an African-American man.²³ He intends to kill Earl, who is an African-American man, just as Albert intends to kill Betty, who is a human being. Is this a hate crime? Well, we would need to know if Earl’s race *motivated* David’s action. But wait, this is precisely the question that looking to David’s intention is supposed to answer. Intentions are supposed to delineate that which is motivationally significant. But if we treat David’s case the same as we treat Albert’s, then we cannot draw this distinction.

When we vary the surgeon example, the same problem arises. Consider Fred who tries to decapitate Gary. Fred does this simply because he thinks it would be funny to have Gary’s head on a stake. Were Gary (or his head) to miraculously live, Fred would not be disappointed. Now consider Helen who is being chased by her abusive husband, Ivan. She swings a machete, narrowly missing Ivan’s head. Helen likewise contends that her intention was not to kill Ivan. Rather, Helen claims that she merely intended “to stop the attack.”²⁴

Query whether we are inclined to credit Helen’s claim over Fred’s. If so, notice that in doing so, we are altering the boundary of intentions. For Fred, we dismiss his motivational significance claim, rejecting that he could understand his action as anything other than a killing. Conversely, for Helen, we may accept her motivational significance claim, thus denying that she had the specific intent necessary for attempted murder.

In these cases, we may be inclined (at least sometimes) to say that the result is intended. But why? Whatever metaphysical status one attributes to intention, this disparity in treatment of seemingly equivalent cases is rather embarrassing. If one believes that, to be intended, there must be an answer to the question “why,” then *why* is that requirement sometimes disregarded? If one believes that an intention is a mental state, what describes the contours of this state, that

²³ Cf. MODEL PENAL CODE § 2.02(2)(a) (2006) (knowledge of an attendant circumstance suffices for acting purposefully toward that element).

²⁴ Cf. GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 186-187 (1988) (discussing how the Goetz jurors viewed Goetz as trying to stop the attack and not as trying to kill the aggressors and how they thus adopted a “moral concept of intent”).

some foreseen side effects are within its scope and others are not? Do we have a coherent account of intentions?²⁵

This Article contends we must move beyond intention both conceptually and normatively. First, to solve the “inseparable effects” enigma, we must abandon the conventional view that intentions are co-extensive with motivational significance. The majority of this Article is devoted to this conceptual argument. In Part I, I present the conventional wisdom that intentions are co-extensive with motivational significance and show how this account is challenged by “inseparable effects” cases. In Part II, I argue that both morality and criminal law presuppose a clear understanding of intentions, and, thus, we must resolve the problem of “inseparable effects.” In Part III, I discuss others’ attempts at explaining the “inseparable effects” problem. I argue that the correct criterion lies in the inner workings of the mind and not in the objective relationship between the result intended and its inseparable effect. In Part IV, relying on literature about the philosophy of mind and the normativity of our thoughts, I set forth an alternative account of intentions as multi-dimensional and multi-meaning. In Part V, I turn normative. I argue that our new understanding of intentions, although revealing how they work in fact and in law, undermines their very normative import. However, our new understanding of intentions may solve current legal problems that our misplaced reliance on intention could not.

I. THE TRADITIONAL VIEW OF INTENTIONS AND THE CHALLENGE OF “INSEPARABLE EFFECTS”

In this part, I set forth the conventional view of intentions—one that identifies intended results by their motivational significance. I then set forth the challenge of “inseparable effects.”

A. *The Conventional View*

It is useful to start with a classic hypothetical: the Terror Bomber and the Strategic Bomber. As explained by Michael Bratman:

²⁵ Accord Simester, *supra* note 10, at 456-57 (“For the purposes of intention at least, I suspect the idea that certain effects might be inseparable would have an intuitive appeal to most people. But it is not clear—and even writers who accept the phenomenon disagree over—which are inseparable and why. We lack criteria, and a rationale for those criteria, which describe when a side-effect, not paradigmatically intended according to the discussion so far, is to be treated as inseparable from another, intended, effect.”).

Both Terror Bomber and Strategic Bomber have the goal of promoting the war effort against Enemy. Each intends to pursue this goal by weakening Enemy, and each intends to do that by dropping bombs. Terror Bomber's plan is to bomb the school in Enemy's territory, thereby killing children of Enemy and terrorizing Enemy's population. Strategic Bomber's plan is different. He plans to bomb Enemy's munitions plant, thereby undermining Enemy's war effort. Strategic Bomber also knows, however, that next to the munitions plant is a school, and that when he bombs the plant he will also destroy the school, killing the children inside. Strategic Bomber has not ignored this fact. Indeed, he has worried a lot about it. Still, he has concluded that this cost, though significant, is outweighed by the contribution that would be made to the war effort by the destruction of the munitions plant.²⁶

Do both Bombers intend the children's deaths? Michael Bratman's answer is no. Only the Terror Bomber intends the death of the children. According to Bratman, intentions serve three roles in an actor's practical reasoning. Intentions guide appropriate means-end reasoning.²⁷ Intentions constrain the actor's other intentions.²⁸ Finally, if one intends to bring about a result, one will endeavor—act in order—to bring about that result.²⁹

As applied to the Terror Bomber, Bratman argues that the children's deaths are intended. First, the Terror Bomber does engage in means-end reasoning. That is, he figures out how to kill the children, including what day to attack and what kind of bombs to use.³⁰ Second, the children's deaths create a screen of admissibility. As Bratman explains, the Terror Bomber will not order a certain troop movement if this movement will cause Enemy to move the children.³¹ Finally, we expect the Terror Bomber to guide his conduct in such a way as to cause the children's deaths.³² If the school has been moved, the Terror Bomber will change his flight plan.³³

In contrast, Bratman argues that the Strategic Bomber does not intend the children's deaths because he lacks the appropriate attitudes.³⁴ The Strategic Bomber will not try to figure out *how* to kill the children.³⁵ The Strategic Bomber will not rule out troop movements that might lead to the evacuation of the school.³⁶ Indeed, the Strategic

²⁶ BRATMAN, *supra* note 2, at 139-40.

²⁷ *Id.* at 141.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 141-42.

³⁴ *Id.* at 142.

³⁵ *Id.*

³⁶ *Id.*

Bomber may be relieved by the school's evacuation. Finally, the Strategic Bomber will not guide his conduct by keeping track of the children and plotting their deaths.³⁷

Bratman's test is one of motivational significance. While Bratman's test is more complex than some, in essence, Bratman claims that those results that motivate behavior are intended. These are the items that we engage in means-end reasoning to get; these are the results that we try to bring about; and these are the items that act as a screen of admissibility. Because the Strategic Bomber is not motivated by the children's deaths, he does not engage in any of this behavior. And because, to Bratman, this behavior is the trappings of intentions, we know the Strategic Bomber does not intend the children's deaths.

Other theorists adopt different tests, each of which boils down to the same requirement of motivational significance.³⁸ The Model Penal Code, which employs the term "purpose" in lieu of intent, requires that the result be the actor's conscious object.³⁹ The conscious object of the Terror Bomber *is* to kill the children, but the Strategic Bomber does not have this goal. Antony Duff argues that we should look to the "test of failure." If the result does not occur, will the action have failed?⁴⁰ If so, the result is intended. Hence, if the children do not die, the Terror Bomber's actions will have failed. On the other hand, if the Strategic Bomber does not kill the children, he can still deem his action successful. Thus, the Strategic Bomber does not intend the children's deaths.

B. *The Challenge of "Inseparable Effects"*

With this distinction in place, let us blur the lines between the Strategic Bomber and the Terror Bomber. Jonathan Bennett suggests the following variation. The Terror Bomber no longer wants the children to die. Rather, "[a]ll that was intended was that the people's bodies should be inoperative for long enough to cause a general belief that they were dead, this belief lasting long enough to speed the end of the war."⁴¹ Indeed, imagine that the Terror Bomber, just before

³⁷ *Id.*

³⁸ Kenny, *supra* note 10, at 148 ("To somebody who is not a lawyer, it might seem that there was a further question relevant to Smith's intention: not only what he foresaw, but what he wanted."); Simister, *supra* note 10, at 446 ("Bluntly stated: things done as means or ends are intended; those done as side-effects are not."); Finnis, *supra* note 10, at 36 ("Whatever, then, is included within one's chosen plan or proposal, whether as its end or as means to that end, is intended, i.e., is included within one's intention(s).").

³⁹ MODEL PENAL CODE § 2.02(2)(a) (2006).

⁴⁰ DUFF, *supra* note 1, at 61.

⁴¹ Jonathan Bennett, *Morality and Consequences* 111 (May 9, 16, 23, 1980), available at

bombing, thinks to himself: "Well, it would be sufficient for me if they all just looked dead. I suppose I really do not care if they die."

Here, Bratman's test denies that the deaths are intended. Now the Terror Bomber will engage in means-end reasoning as to how to drop the bomb on the children. He will rule out alternatives that make the children less available. He will aim at them. Yet, their *deaths* do not appear to be motivationally significant. Under the Model Penal Code, the children's deaths are not the Terror Bomber's conscious object. Moreover, under Antony Duff's test, the Terror Bomber will not deem his action a failure if the children only appear dead, but do not, in fact, die.

At this point, it might be tempting to insert the adjective "imaginary" before "inseparable effects." It does indeed seem hard to take this case seriously. Yet, to have a coherent account of intentions, we need an account that explains why the Terror Bomber variation is so implausible. Indeed, in the next part, I argue that both law and morality require a coherent account of "inseparable effects" cases.

II. WHY LAW AND MORALITY REQUIRE A SOLUTION TO "INSEPARABLE EFFECTS" CASES

A. *Morality and the Doctrine of Double Effect*

An account of "inseparable effects" cases is indispensable because moral and legal responsibility may hinge on the distinction between intended results and their side effects. First, under the DDE, one may not justify intended killings, but may justify side effects.⁴² The DDE still plays a central role in many accounts of just war theory, and unfortunately, we still live in times in which we must assess the justifiability of war.⁴³

Indeed, our moral discourse frequently recognizes the distinction between those effects intended and those foreseen. During World War II, the British Government, despite its killing of German civilians, held tight to the view that it was morally important that they only intended to hit "military objectives."⁴⁴ Conversely, consider this critique of the United States' bombing of Afghanistan:

www.tannerlectures.utah.edu/lectures/bennett81.pdf.

⁴² BRATMAN, *supra* note 2, at 140 (discussing the effect of this principle).

⁴³ For recent discussions of the applicability (or inapplicability) of the DDE to modern warfare, see F.M. Kamm, *Failures of Just War Theory: Terror, Harm, and Justice*, 114 ETHICS 650 (2004); Steven Lee, *Double Effect, Double Intention, and Asymmetric Warfare*, 3 J. MIL. ETHICS 233 (2004).

⁴⁴ Finnis, *supra* note 10, at 46-47.

We, unlike Bin Laden, never deliver a bomb with the intention of killing a civilian. That's a valid distinction. Still, Donald Rumsfeld has said that some collateral damage is bound to happen. So, like Bin Laden, we launched a war knowing that it entailed civilian deaths; the deaths were inseparable from a strategy justified by a goal we deemed good, so we proceeded to cause them.⁴⁵

This "moral equivalence" argument begins by acknowledging the distinction between intended and known killings and then argues that this is a distinction without a difference. Some theorists agree with that view, while others find the distinction between intention and knowledge to be meaningful.⁴⁶ For instance, one might think that however problematic the foreseen killing of innocents in Afghanistan is, it cannot compare to the intentional killing of innocents in Dresden.⁴⁷

Notably, this debate over the relevance of intentions presupposes a coherent definition of what is intended.⁴⁸ Yet, Bennett's Terror Bomber variation leaves us to doubt whether we have a satisfactory account of intentions. At the moment, a proponent of the DDE must either accept Bennett's narrow view of intentions, thus rendering the DDE too narrow to give useful guidance, or admit that intentions are broader than motivational significance, thus making the DDE's reliance on intentions suspect.

B. *The Importance of Intention in Criminal Law*

At first blush, there does not seem to be a problem with the law's treatment of intentions. If the defendant has the intention that is prohibited by a criminal statute, then he may be guilty of the offense. If

⁴⁵ Posting of Robert Wright, "Moral Equivalence," to Slate, <http://slate.msn.com/?id=2058088> (Nov. 2, 2001, 09:00 PT); accord Robert Fisk, *Return to Afghanistan: Explosives That the US Knew Would Kill Innocents Continue to Take Their Toll*, COUNTERPUNCH, Aug. 10, 2002, <http://www.counterpunch.org/fisk0810.html> ("When the Americans dropped this ordinance on the Taliban, they must have known this; they must have known that each of their missions in their 'war on terror' would later cost the lives of countless innocent Afghans.").

⁴⁶ For the view that this is not a meaningful distinction, see HART, *supra* note 1, at 122; ERIC D'ARCY, *HUMAN ACTS: AN ESSAY IN THEIR MORAL EVALUATION* 170-74 (1963); Hans Oberdiek, *Intention and Foresight in Criminal Law*, 81 MIND 389-400 (1972); J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 160-168 (1977) (rejecting the doctrine of double effect). For the view that intention is morally distinguishable from foresight, see Anthony Kenny, *Intention and Mens Rea in Murder*, in *LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H. L. A. HART* 161, 172-74 (P.M.S. Hacker & J. Raz eds., 1977) (arguing that murder should not include foresight); G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHILOSOPHY 1, 1-10 (1958); Charles Fried, *Right and Wrong—Preliminary Considerations*, 5 J. LEGAL STUD. 165, 165-200 (1975).

⁴⁷ I thank Michael Moore for the Dresden example.

⁴⁸ Moore, *supra* note 22, at 245 ("As Hart perceived, one can get at this question—of the role of purpose in assessing culpability—only if one is clear about the concept of purpose . . .").

he does not have that intention, then he is not guilty. How do “inseparable effects” cases raise a problem for the criminal law?

Resolving the “inseparable effects” problem is essential because “inseparable effects” cases challenge our bedrock assumptions about intentions. There are three intention questions for the criminal law.⁴⁹ First, we must ask the general content question. How are we to understand what it was in fact that a defendant intended? This question—a question philosophers of mind might call a question of “representational content”—is what we have been dealing thus far. Second, we must ask whether what the defendant intended is, in fact, an instance of the type of conduct prohibited by the criminal law. For example, if a statute prohibits intending to maim, and a defendant intends to cut off the victim’s leg, how is it that we say that the defendant had the requisite intention? Third, we must ask whether the defendant succeeded in doing what he intended. That is, if the defendant intended to shoot the victim in the left leg, but missed and hit the victim in the right leg, how is it that we determine whether the defendant did what he intended?

In this section, I explore these questions. I argue that the second and third categorization questions ultimately depend upon how we answer the first question—identifying the content of the defendant’s intention. Thus, our criminal laws ultimately depend upon a clear understanding of the content of a defendant’s intention. We must resolve the question of inseparable effects.

1. Representational Content

While the question of representational content will occupy us for the remainder of this Article, I will briefly set forth its relevance here. The criminal law often relies on the differences between intention and knowledge.⁵⁰ Many state statutes still require that the defendant act with a specific intent to kill.⁵¹ Would our newly defined Terror Bomber (who only wants the civilians “to appear dead”) have that intent? Moreover, while the Model Penal Code rarely distinguishes between

⁴⁹ I am indebted to Michael Moore for suggesting this framework for analyzing the problem.

⁵⁰ For a critique of the criminal law’s reliance on this distinction, see LARRY ALEXANDER, KIMBERLY FERZAN, & STEPHEN MORSE, *A CULPABILITY-BASED THEORY OF CRIMINAL LAW* chs. 2 & 8 (manuscript on file with author).

⁵¹ See, e.g., D.C. CODE § 22-401 (2007) (assault with intent to kill); GA. CODE ANN. § 16-7-88 (2007) (possession of explosives with intent to kill); ID. CODE ANN. § 18-4014 (2007) (administering poison with intent to kill); N.C. GEN. STAT. § 14-31 (secret malicious assault with intent to kill); OKLA. STAT. tit. 21, § 651 (2007) (poisoning with intent to kill); S.C. CODE ANN. § 16-3-620 (2006) (assault and battery with intent to kill); WIS. STAT. ANN. § 940.01 (2007) (first degree intentional homicide).

purpose and knowledge, the distinction between purpose and knowledge remains critical in a few important areas. The crime of conspiracy requires the defendant act “with the purpose of promoting or facilitating” a crime.⁵² This same mens rea is required for complicity.⁵³

Across the Atlantic, English jurisprudence has been on a veritable roller coaster in its attempts to define intention.⁵⁴ Indeed, English courts have yet to determine whether a virtually certain effect is an intended result.⁵⁵ This question was squarely presented in February 2003: Darren Matthews and Brian Alleyne, along with two other defendants, abducted and terrorized Jonathan Coles, ultimately throwing Coles off a bridge.⁵⁶ Coles, who told the defendants that he could not swim, drowned.⁵⁷ The defendants were convicted of murder after the trial judge instructed the jury that the defendants’ virtual certainty that death would occur as a result the defendants’ actions was sufficient to constitute an intention to kill.⁵⁸ The appellate court held that “the law has not yet reached a definition of intent in murder in terms of appreciation of virtual certainty.”⁵⁹ Nevertheless, they characterized the

⁵² MODEL PENAL CODE § 5.03 (2006).

⁵³ *Id.* § 2.06.

⁵⁴ Four English cases track the movement from an objective standard to foresight to motivational significance. See *DPP v. Smith*, [1961] A.C. 290 (defendant drives recklessly to throw police officer off his car; court approves finding of intention based on what a *reasonable man* would have thought would happen to the victim); *R. v. Hyam*, [1975] A.C. 55 (woman sets fire to mailbox of former lover’s new love interest, Mrs. Booth, ultimately killing Mrs. Booth’s two daughters; court approves finding of intention where the defendant knows the result is highly probable); *R. v. Moloney*, [1985] A.C. 905 (drunk stepson and stepfather challenge each other to quickdraw and son ultimately pulls the trigger while pointing the gun directly at the father; court holds foresight of consequences while evidentiary of intention is not sufficient for intention); *R. v. Hancock & Shankland*, [1986] A.C. 455 (two miners during a strike throw heavy concrete off bridge under purported purpose of stopping traffic but the concrete hits and kills people below; court reaffirms that foresight is only evidentiary of intention).

⁵⁵ English courts remain uncertain about when virtual certainty constitutes intention. See *R. v. Woollin*, [1999] 1 Cr. App. R. 8 (Steyn, L.) (arguably suggesting that virtual certainty is sufficient for intention); *R. v. Matthews & Alleyne*, [2003] EWCA Crim. 192 (holding that *Woollin* did not change law so as to include “virtual certainty” within the definition of intention); *R. v. MD*, [2004] EWCA Crim. 1391 (implicitly interpreting *Woollin* to hold that intention can include virtual certainty, but holding that intention need not entail virtual certainty).

⁵⁶ *R. v. Matthews & Alleyne*, [2003] EWCA Crim. 192.

⁵⁷ *Id.*

⁵⁸ *Id.* ¶¶ 21-22. Specifically:

With regard to proving intent an intent to kill the prosecution will only succeed in proving this intent either:

By making you sure that this specific intention was actually in the mind/s of the defendants, or

(a) By making you sure that Jonathan Coles death was a virtual certainty (barring some attempt to save him), and

(b) The defendant whose case you are considering appreciated at the time Jonathan was thrown off the bridge that this was the case, and he then had no intentions of saving him, and knew or realized that the others did not intend to save him either.

⁵⁹ *Id.* ¶ 43.

inference from virtual certainty to intention as sometimes “irresistible.” Indeed, in the instant case, the inference was so irresistible that the court found the error harmless: “If the jury were sure that the appellants appreciated the virtual certainty of [Cole’s] death when they threw him over the bridge and also that they had no intention of saving him from such death, it is impossible to see how the jury could not have found the appellants intended Jonathan to die.”⁶⁰ This “irresistible inference” is none other than an inseparable effect.⁶¹

The starting point for analyzing whether the defendant violated a criminal statute is the discernment of what the defendant intended. That is, we look to the defendant’s subjective state of mind. What was the content of his intention as he understood it? The jury must determine this fact. The problem is that “inseparable effects” cases lead us to question whether we even understand what it means for an actor to intend to cause a harm.

2. Matching Intentions with Prohibitions

The criminal law does not prohibit one actor from doing a specific act. No criminal code prohibits John from shooting Mary in the chest on February 2, 2007, at 4 p.m. Rather, criminal codes prohibit *types* of conduct and *types* of mental states. It is a crime to kill another intentionally. Whenever a jury finds a defendant guilty, the jury must therefore find that the act the defendant did was one instance (i.e., a token) of the type prohibited by criminal law.

Before turning to this problem, we should first distinguish it from a distant cousin. A defendant might argue that he has made a legal/moral mistake and thus does not have the requisite intent. For instance, if a crime of rape requires a man to intentionally compel a woman to have sexual intercourse by means of “force” and he compelled his female employee to have intercourse with him by threatening to otherwise fire her, the question of whether this threat is “force” is a legal question.⁶² A mistake about whether this threat is “force” would not exculpate him because it is a mistake about how the law defines “force.”

This is not the sort of problem we are dealing with here. Rather, in the matching cases addressed below, the claim is one about the facts.

⁶⁰ *Id.* ¶46.

⁶¹ *Cf.* *Payne v. LeFevre*, 825 F.2d 702, 708 (2d Cir. 1987) (finding a *Sandstrom* error to be harmless because “we cannot conceive of how the jury, after finding that Payne fired the shotgun into his victim’s chest at point-blank range, rationally could have concluded other than that Payne intended to kill Officer Taylor—given Payne’s deliberate choice of this powerful and notoriously indiscriminate weapon”).

⁶² I thank Peter Westen for this hypothetical and I thank both Peter Westen and Victor Tadros for prompting me to clarify my argument in this respect.

The actor knows what decapitation is and knows what killing is and understands that decapitation is killing. (This understanding is what is denied in the rape hypothetical.) What the defendant asserts is that he can intend the specific act of a broader type, where he knows that his act is an instance of the type, without intending the broader understanding. In other words, Albert intends to kill Betty, and knows she is a human being, so why is that Albert intends to kill a human being (instead of only doing so knowingly)? I am not claiming that Albert's denial of intending to kill a human being is logical (or isn't completely unbelievable); the question is how to understand intentions such that we understand why an intent to kill Betty meets the legal requirements of an intent to kill a human being. It seems that Albert knows that Betty is a human being, but Betty's status as a human being is not motivationally significant.

If a defendant only intends a very specific description of an act but the criminal law prohibits only a broader general category, how is it that the criminal law can match what the defendant intended to what the law prohibited? There are two potential solutions. First, we can admit that there is some slippage between representational content and the criminal prohibition. Second, we can show how representational content includes the criminal prohibition. If we must rely on representational content, then as argued in the previous section, we must face the problem of "inseparable effects."

Michael Moore recently took the first tack. Moore simply argues that the law is sloppy. He stipulates that putting an eye out is "maiming" under the law, and then imagines an actor who intends to put out his victim's left eye. (The actor misses and hits the right eye, but we will get to that wrinkle in the next section.) Is the actor's intention—to put out the left eye—an instance of the prohibited intention of maiming? Moore argues:

Since very few wrongdoers use representations exactly matching the act-type descriptions of moral norms, we have to get sloppy And we do. I am confident that D's intention-token will and should be taken to be an instance of the type of intention morality prohibits. D intended to disfigure V no matter which . . . representation[] . . . he had in his mind.⁶³

I demur. I just do not like my criminal law sloppy. This objection is not aesthetic. The problem with sloppiness is that it can lead to disproportionate punishment. If the criminal law delineates having a particular intention as deserving of a certain quantum of punishment, then when we allow for any "slop" between what the defendant really intended (representational content) and what the criminal law prohibits,

⁶³ Moore, *supra* note 5, at 18-19.

we run the risk that the defendant does not deserve the amount of punishment allocated by the statute. To see how this problem arises, let us return to Moore's sloppy criminal law.

Moore's approach is a two-tiered approach.⁶⁴ It is a recognition that there is a difference between what goes on in the mind of the actor and the way in which the rest of the world describes the actor's mental states. That is, while Oedipus would never say that he intended to marry his mother (because he did not know the woman he intended to marry was his mother), we might say that Oedipus intended to marry his mother, thus matching an external description of Oedipus' intention with Oedipus' own representational content.

The problem with the two-tiered approach should also be apparent from the illustration above. If it were a crime to intend to marry one's mother, Oedipus would not be guilty of such a crime. Let us begin by noting that mental states—beliefs, desires, intentions—all have intentional objects. We do not just believe, desire, or intend. Rather, we believe *x*; we desire *y*; and we intend *z*. Now, in the world outside our minds, there may be many descriptions for *x*, *y*, and *z*. For example, an item, *x*, may be: (1) a red shirt; (2) an item yielding \$2 of profit for Clothing Corporation; and (3) a product made by child slave labor in a foreign country. All of these descriptions may refer to item *x*.

Yet, in our minds, when we believe, desire, or intend something, we do not believe, desire, or intend all of the possible descriptions of that intentional object. Thus, when Julia goes to the mall and she decides to buy item *x*, she may simply intend to buy a red shirt. Likely, she has no belief, desire, or intention to affect Clothing Corporation's profits. She could also firmly believe (albeit incorrectly) that item *x* was manufactured in the United States by employees paid handsomely for their efforts. Therefore, we cannot attribute the other descriptions of item *x* to Julia's intended purchase. We cannot substitute one description of an intentional object for another, even if the two descriptions are equivalent in the real world.⁶⁵

The problem is that the two-tiered approach does not impose any limits on when we may say the actor had an intention and when he did not. The criminal law is ultimately concerned with *representational*

⁶⁴ John Perry, *Intentionality (2)*, in *A COMPANION TO THE PHILOSOPHY OF MIND* 386, 393-94 (Samuel Guttenplan ed., 1994).

⁶⁵ See Rebecca Dresser, *Culpability and Other Minds*, 2 S. CAL. INTERDISC. L.J. 41, 81 (1993) (arguing that "[i]ntentional states have an important logical property called 'referential opacity' or 'non-transparency'" and "[u]nlike other informational statements, the truth or meaning of intentional statements can change if a word or phrase is replaced by another that objectively refers to exactly the same thing"). See generally WILLIAM VAN ORMAN QUINE, *FROM A LOGICAL POINT OF VIEW* 139-59 (2d ed. rev. 1980) (discussing referential opacity). Moore certainly recognizes that intentions are referentially opaque, but he does not give an account of when we may get sloppy and we may not. See Moore, *supra* note 5, at 17-18.

content. If it were sufficient simply to match representational content to any other real world description, then Oedipus may be guilty for intending to marry his mother, Julia may be guilty for intending to buy a shirt made of child slave labor, and the reader may be guilty of intending to read an article by the mother of a three-year-old (even if the reader does not know the author has a child!).⁶⁶

In other words, sloppiness has the potential for grossly disproportionate punishments. If we conclude that because (1) an actor intends *a*, and (2) in the real world $a=b$, then (3) the actor intends *b*, we have made conceptual and normative errors. Conceptually, as noted above, we cannot say that someone intends all of the real-world descriptions of her intentional object. Julia cannot intend to buy a shirt made of child slave labor if she believes her shirt was manufactured in the United States. Moreover, because Julia's culpability, and thus the amount of punishment she deserves, does not depend on strict liability (no one would know about the child slave labor), or negligence (she should have known), or recklessness, or knowledge, but on *intention*, then the normative decision encompassed in the statute is to punish only for this level of culpability and not another.

Now, I do not take Moore to be arguing for this sort of substitution. Rather, I think that even Moore takes as a given that the actor is aware of the fact that *a* is an instance of *b*. That is, the actor understands that she is engaging in act *a*; she understands that *a* is an instance of *b*, but she denies intending *b*. Here is where Moore thinks sloppiness is acceptable.

However, even if one were to say that Moore's actor is an intentional maimer because he *knows* that putting out an eye is maiming, we then need to know why all instances of knowledge are not sufficient to satisfy prohibited intentions. That is, why is it not the case that providing an answering service for known prostitutes is sufficient for intending to further their criminal enterprise?⁶⁷ Why not say that providing the name and address of a known drug dealer is intending to aid in the distribution of narcotics?⁶⁸ In both of these cases, why not say that when the defendant intends an act, and knows that it will aid, by the "principle of sloppiness" the defendant may be said to aid? That is, if the statute only punishes intentions, why is it that sometimes we can "get sloppy" and punish knowledge as well?

⁶⁶ See Perry, *supra* note 64, at 394 ("When knowledge of a single object is not integrated . . . the two-tiered approach can be confusing and misleading.").

⁶⁷ *People v. Lauria*, 59 Cal. Rptr. 628 (Ct. App. 1967) (knowledge is not sufficient for conspiracy).

⁶⁸ *State v. Gladstone*, 474 P.2d 274 (Wash. 1980) (knowledge is not sufficient for complicity).

In my view, we cannot simply admit sloppiness between the law and representational content because there is no principle by which we can determine when it is permissible to be sloppy and when it is not. Rather, we must take the second approach. We need *an account of representational content* that explains why the intent to take out the left eye is the intent to maim. This is the very same account we need to explain why Glanville Williams' surgeon who intends to decapitate also intends to kill. That is, rather than allow some slippage between representational content and the criminal law's prohibitions, I believe we must turn inward and revisit our understanding of representational content itself. If we wish to understand why jurors may apply broad legal rules to specific facts—as they do everyday—then we must solve the problem of inseparable effects.

3. Matching Intention with Result

Our conception of intentions is also fundamental to a second categorization question: how can we tell whether the defendant did what she intended? While there are times that a defendant may succeed in exactly the way she planned, our causal abilities are often imperfect. When these imperfections occur, we must determine whether the defendant may be held responsible for intentionally causing the harm.

Let us now introduce Michael Moore's second complication.⁶⁹ Assume that the defendant intended to put out the victim's left eye, but missed and hit the right. Is the defendant an intentional maimer—because he caused the harm he intended? Or did he attempt to maim (and also accidentally cause harm to the right eye)? Once again, Moore thinks we can simply be sloppy:

So what did D intend? Did he represent the type of event he was trying to bring about as a "putting out of V's left eye," as a "putting out of V's right eye," as a "putting out of *an* eye of V's" (in the sense of any eye), as a "putting out of an eye of V's" (in the sense of one particular eye), as a "harming V," a "disfiguring V," a "maiming V," etc. My supposition: *any* of these representations will suffice to match what D did to what he intended to do, to make D an intentional maimer, even though it is unlikely in the extreme he had more than one or two of them as the representation under which he acted. If so, notice how much slop there is in fixing what it was that D intended.⁷⁰

Once again, it is time to tidy up. I will begin by noting that there is an easy way to sidestep this issue. This matching question only arises if

⁶⁹ See Moore, *supra* note 5, at 16-17.

⁷⁰ *Id.* at 18.

one cares about proximate causation. However, if one believes (as I do) that results are irrelevant to responsibility and blameworthiness, this problem simply disappears.⁷¹ Transferred intent cases, which are ultimately causation problems, cease to be a problem. In the original hypothetical Albert is guilty of both attempting to harm Betty and (likely) culpably risking Carla. He is responsible for the risks he imposed on both people. This result is far more conceptually and normatively satisfactory than trying to figure out how to “transfer” the intent. If we only care about what the defendant believed himself to be risking—and not the harm he actually causes—there is no need to play this matching game.

Still, even if proximate cause remains a part of the criminal law, I hardly think the answer is to allow for slippage. Indeed, the question of when to slip and how much to slip appears to be decidedly normative. For example, in the infamous tort case, *Mohr v. Williams*, the plaintiff consented to an operation on her right ear, but the surgeon then performed an operation on the plaintiff's left ear.⁷² The court held that the plaintiff did not consent to the operation on her left ear when she consented to her right ear surgery. No slippage allowed.

We cannot therefore simply allow for slippage; rather, we must have an account of what justifies such slippage. Consider a game of friendly pool. Typically the players will allow any ball in any pocket no matter what the player intended. But, even amongst the friendliest of players, one must correctly call how and where the eight ball will land. In this game, there is a rationale: among friends, insisting on too much perfection and skill makes for a tedious game of pool, but at the very end, to win, one must show some requisite degree of skill. If criminal law is like friendly pool, but consent is equivalent to sinking the eight ball, we need an account of why there is a difference, but Moore does not provide one.

But beyond the questions of whether we should care about proximate cause and how one can justify any slippage, there is the question of how we understand intentions. Moore seems to lose sight of this. That is, let us return to the actor who aims for the left eye and hits the right eye, and let us embellish the story a bit.

In asking whether the actor did what she intended to do, we look to what motivates her. What if the defendant sought to put out the victim's left eye because that was the eye with which the victim winked at the defendant's boyfriend? Then, which eye is injured matters. It is *motivationally significant*. The defendant will feel that she failed if she does not injure the left eye. Thus, to say that the defendant did what she intended to do when she misses the left and hits right, completely

⁷¹ For a defense of this view, see ALEXANDER, FERZAN, & MORSE, *supra* note 50, ch. 5.

⁷² 104 N.W. 12 (Minn. 1905).

eviscerates our fundamental conception of intention—that what is intended is what is motivationally significant. We cannot have one view of intention for representational content and a different view of intention for determining whether that representational content was achieved.

In summary, an understanding of intentions is critical to the criminal law. We must understand: what the defendant intended (representational content); whether what the defendant intended was prohibited by the criminal statute (token/type matching); and when we can say that a defendant succeeded in doing what she intended (causation matching). All of these questions presuppose a coherent account of intentions. Currently, however, our account of intention as to representational content substantially departs from our account of intentions for token/type and causation matching. That is, if a defendant only intends the motivationally significant description (our current representational account) then the criminal law cannot perform the token/type and proximate cause matches. Thus, it seems that perhaps there is something askew with how we understand representational content in the first instance. We must face the “inseparable effects” enigma. When an agent intends *a*, what determines the scope of *a*? Why are we predisposed to think that Glanville Williams’ eccentric surgeon who intends to remove a heart also intends to kill? In other words, how is it that we account for the match between representational content and criminal prohibition? Why might we think, contrary to Robert Audi, that the agent who intends to order the lobster tails, knowing them to be the most expensive thing on the menu, likewise intends to order the most expensive thing on the menu? In the next part, I explore other theorists’ solutions to this problem and contend that the correct criterion lies within the agent’s mind.

III. ATTEMPTS TO RESOLVE THE “INSEPARABLE EFFECTS” PROBLEM

In this part, I canvass the variety of approaches that theorists employ to resolve this puzzle. I begin by discussing two objective criteria for intention—certainty and logic—and show why these criteria do not track the borders of intentions. I then turn inward to the mind of the agent. Here, I consider the work of Michael Moore and A.P. Simester. While I will later adopt parts of both of their views, in this part, I will simply demonstrate how Moore and Simester resolve these problems and identify the points of disagreement between the two.

A. *Objective Standards*

Assuming that an agent intends *a* and it seems that *b* is “inseparable” from *a*, how do we account for this notion of inseparability? In what relation must *a* and *b* stand? We might think that this inseparability has to do with the objective relationship between *a* and *b*. One approach advanced by theorists is to point to the empirical certainty that *b* will follow *a*. Other theorists view the connection of *b* following *a* as a logical connection. Neither of these accounts is satisfactory.

While intuitively appealing, certainty is the least persuasive account of the distinction. The argument goes like this: When one removes a heart, we have no doubt that the person will die. Hence, since *a* will follow *b*, if *a* is intended, so is *b*. This explanation is suggested by Lord Bridge in *Moloney*, where he includes “morally certain” side effects within the penumbra of that which is intended. Glanville Williams also embraces this approach.⁷³

Despite its appeal, certainty is not a sufficient criterion for intention. First, it fails our ordinary language, as we distinguish between those things that we intend and those that we foresee. For example, as Antony Duff tells us, those who drink may know the hangover will follow, but we do not say the hangover is intended.⁷⁴ Indeed, consider the following examples from John Finnis:

One who hangs curtains knowing that the sunlight will make them fade does not thereby intend that they shall fade. Those who wear shoes don't intend them to wear out. Those who fly the Atlantic foreseeing certain jetlag don't do so with the intention to get jetlag; those who drink too heavily rarely intend the hangover they know is certain. Those who habitually stutter foresee with certainty that their speech will create annoyance or anxiety, but do not intend those side-effects. Indeed, we might well call the academics' extended notion of intent [to include side effects] the Pseudo-Masochist Theory of Intention—for it holds that those who foresee that their actions will have painful effects on themselves *intend* those effects.⁷⁵

⁷³ GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 84-85 (2d ed. 1983) (“Clearly, a person can be taken to intend a consequence that follows under his nose from what he continues to do, and the law should be the same where he is aware that a consequence in the future is the certain or practically certain result of what he does. . . . A consequence should normally be taken as intended although it was not desired, if it was foreseen by the actor as the *virtually certain* accompaniment of what he intended.”) (footnote omitted) (emphasis in original); see also Kenny, *supra* note 10, at 173 (“The intent to kill should be taken to include the (direct) intent to bring about a state of affairs from which one knows death will certainly follow.”).

⁷⁴ DUFF, *supra* note 1, at 88-89.

⁷⁵ Finnis, *supra* note 10, at 46 (footnote omitted).

It just sounds strange to us to include these side effects within our definition of intention. Rather, we commonly distinguish between these side effects and those that are intended.

Moreover, conflating intention and belief not only runs afoul of our ordinary language usage but also ignores key differences between the two concepts. Intention and belief are the products of different types of reasons and have different rules.⁷⁶ For example, intention and belief have different rules of rationality.⁷⁷ Thus, in situations of ambivalence, one may intend *x* over *y* but one may not believe *x* over *y*.⁷⁸ As Harman notes, if you can drive to work via the expressway or via back routes and each manner is equally good, then, if you decide to choose to take the expressway, there is nothing irrational about that decision.⁷⁹ But, if a co-worker may have taken one of two equally good routes, it would be criticizably irrational for you to believe that the co-worker took one route over the other.⁸⁰ That is, it would be odd for you “to decide to believe” that your co-worker took the expressway to work today when you have no reason to believe she chose this route over the other. Thus, intentions are conceptually distinct from beliefs. Any conflation of the two not only disturbs our ordinary usage but also threatens the logic and rationality of the concepts.⁸¹ Knowledge is not co-extensive with intention.

Let us turn to another objective approach. Recognizing the failure of certainty as a guiding principle, Duff suggests that the connection may be logical.⁸² Recall that Duff claims that the appropriate test of whether something is intended is the “test of failure.”⁸³ Thus, *x* is intended if the actor would deem her action a failure if *x* is not achieved. Turning to the problem of “inseparable effects,” Duff expands the applicability of this test. He reasons that if *x* entails *y*, then if *y* does not occur, *x* does not occur. And of course, if *x* does not occur, the action is a failure. Thus, the actor must intend *y* if she intends *x*.⁸⁴

⁷⁶ HARMAN, *supra* note 15, at 63, 65 (intentions are part of practical reasoning and beliefs are part of theoretical reasoning).

⁷⁷ *Id.* at 14-17.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Indeed, Michael Bratman’s entire project is to explain how intentions are not simply reducible to the beliefs and desires that yielded the intentions to act. Instead, intentions serve roles that beliefs and desires do not. BRATMAN, *supra* note 2, at 20. Bratman explains:

I think we gain more insight into the kinds of agents we are by putting aside such attempts at reduction and taking seriously the idea that intentions are distinctive states of mind, on par with desires and beliefs. Intentions are conduct-controlling pro-attitudes, ones which we are disposed to retain without reconsideration, and which play a significant role as inputs into reasoning to yet further intentions.

⁸² See also CHISHOLM, *supra* note 16, at 75.

⁸³ DUFF, *supra* note 1, at 61.

⁸⁴ *Id.* at 89. Duff later admits to some uncertainty about how this problem should be

In taking this approach, Duff inappropriately shifts from a test of motivational significance to an argument y is intended whenever it follows from x . Consider Duff's own example. Alice wants to go out drinking and she always has a hangover the following morning. Duff claims that Alice, even if she intends to drink, does not intend the hangover—certainty that the hangover is sure to follow is insufficient to make the hangover intended.⁸⁵ Under the "inseparable effects" test Duff proposes, if Alice is not hungover, this would be a failure of her intention to drink (she must not have gone out). Thus according to Duff, the hangover, too, is intended! Duff's new test renders intended every result that follows from an intended action. Hence, Duff's account of inseparable effects resolves the problem only by obliterating the distinction between purpose and knowledge in all instances. As Simester correctly notes, the test now captures not only those things which are intended (whatever we may mean by that) "but also all *sine qua non* effects, whether sought or incidental."⁸⁶ Indeed, Duff's test is extremely problematic in that it does not require that the actor be aware of the certain side effect. Rather, the relationship between x and y is causal. Hence, this account would render intended results about which the actor was not even aware.⁸⁷

The key to solving this puzzle is to realize that certainty and logic do matter. But they are not employed as external criteria as the theorists discussed above suppose. Rather, these concepts are embedded in our view of rational people, and how people think. The solution to this conundrum requires us to move from the objective, to the subjective. We must move to questions of meaning and mind.

B. *The Subjective Approach*

So how is it that some descriptions of what is intended still seem linked to other descriptions? Where does this linkage come from? The answer is the linkage comes from *the agent*. In this section, I will canvass the views of Michael Moore and A.P. Simester, both of whom correctly recognize that the connection lies within the mind. In Part IV, I will build on their theories and give a fuller account of intentions and inseparable effects.

resolved. *Id.* at 91.

⁸⁵ *Id.* at 88-89.

⁸⁶ Simester, *supra* note 10, at 457.

⁸⁷ Simester raises the additional objection that the connection does not even appear to be logical. "Removing a patient's heart does not entail her death as a matter of logic." *Id.* at 457-58.

1. Michael Moore and Intention Individuation⁸⁸

Michael Moore views the “inseparable effects” enigma as a problem of intention individuation. Moore claims that “[t]o prevent the collapse of knowledge into purpose in every case, we need some theory that tells us how to individuate intentions, that is, that tells us when we have two different intentions and when there is in reality only one.”⁸⁹ Moore begins by defending the view that intentions are metaphysical objects and that the object of intentions are propositions.⁹⁰ Moore then argues that “we should say that two propositions are the same when the senses (meanings) of the words expressing them are believed to be the same by the holder of the mental states in question.”⁹¹ That is, if “lobster” means the same thing to the actor as “most expensive thing on the menu” then having the intention to order the lobster is one and the same intention as intending to order the most expensive thing on the menu.

Thus, according to Moore, intentions are real things; they have metaphysical status. It is an error to say that we are equating an intention to *x* with an intention to *y*. Rather, the issue is whether we are looking at one and the same intention. To determine whether this is so, says Moore, we must look to whether *x* and *y* mean the same thing to the actor.

Moore sets forth a two-prong test for intention individuation: two nominally distinct intentions will be the same when the language used to describe their objects (1) has the same reference and extension, and (2) where that language means the same to the holder of the intention(s) in question.⁹²

While we have already addressed the latter requirement, we should spend a moment with the first prong of Moore’s test. An object’s extension is its denotation.⁹³ An object’s reference is “the relation that

⁸⁸ In his recent work, Moore retreats from this position, arguing that the problem is one of classification (as previously discussed) and not of representational content. See Moore, *supra* note 5, at 16. Because I believe that Moore was closer to correct then than he is now, I will address his previous view.

⁸⁹ Moore, *supra* note 22, at 248.

⁹⁰ See *id.* at 253-58. Moore leaves room for reductionism, entertaining the thought that we may “ultimately cash out propositions to functional states of mind and, ultimately, to physiology.” *Id.* at 258.

⁹¹ *Id.* at 259.

⁹² *Id.* at 260.

⁹³ Philosophypages.com, A Dictionary of Philosophical Terms and Names, <http://www.philosophypages.com/dy/e9.htm#exte>, gives the following definition:

extension / intension[:] Distinction between ways in which the meaning of a term may be regarded: its extension, or denotation, is the collection of things to which the term applies; its intension, or connotation, is the set of features those things are presumed to

holds between a term and the things to which it applies.”⁹⁴ Thus, even if two intentional objects mean the same thing to the actor, they must also refer to the same thing in the real world. Because of this restriction, Moore claims that intending to strike a glass is *not* the same intention as breaking a glass. Why?

Moore argues these two items are distinct types of events. Events are the same, claims Moore, when the events have the same causes and the same effects. Here, however, the relationship is asymmetrical. To strike a glass is to break it, but the converse is not true. “In short, there are asymmetrical causal relations between each of these pairs of events, and between each of these pairs of types of events, that prevents identifying one as the other.”⁹⁵ Thus, Moore’s test is not wholly subjective. Instead, he requires that the two terms actually refer to the same object.

What about the lobster tails? When we are talking about a person or object, an asymmetrical causal relationship does not exist. So long as two words have the same meaning to the holder of the intention may we substitute? Moore places further restrictions:

[A]n intention to appoint Garcia may be the same intention to appoint a fifty-year-old man, but only if the description, “the fifty-year-old man”, [sic] is the way in which the holder of the intention(s) calls Garcia to mind in this context. If Garcia’s being fifty years old is not that important [sic] (“vivid”) to the holder of the intention, then one cannot substitute, “fifty-year-old-man” for “Garcia” in the object of the intention; for such intentions are distinct, and one is not necessarily the other.⁹⁶

Hence, even when two words or phrases refer to the same person, we may only substitute, according to Moore, if the second description is “vivid.”

Moore’s solution is on the right path. His focus is on whether the senses are “*believed to be the same by the holder of the mental states in question.*” I discuss *infra* the restrictions that Moore places on sense substitution.⁹⁷ For now, we turn to one more theorist for his variation of this internal solution.

have in common.

⁹⁴ Philosophypages.com, A Dictionary of Philosophical Terms and Names, <http://www.philosophypages.com/dy/r.htm#ref>.

⁹⁵ Moore, *supra* note 22, at 260.

⁹⁶ *Id.* at 261. In private conversation, Moore renounced this requirement as well. I believe this argument to be substantially correct, and, thus, include it here.

⁹⁷ See *infra* Part IV.B.

2. A.P. Simester and Instantiations of Meaning and Expectation

A.P. Simester builds on H.L.A. Hart's solution to this puzzle.⁹⁸ Hart's view was that foreseen outcomes are not included within the umbrella of intention unless "a foreseen outcome is so immediately and invariably connected with the action done that the suggestion that the action might not have that outcome would by ordinary standards be regarded as absurd, or such as only a mentally abnormal person would seriously entertain: the connexion between action and outcome seems therefore to be not merely contingent but rather to be conceptual."⁹⁹

Simester aptly notes that not only is the connection conceptual but also turns on *the agent's* conception. Simester offers the following test:

Some outcome Y is inseparable from X if, although there may exist worlds in which bringing about X without Y is possible, the world as the agent understands it admits of no such possibility. In cases of inseparability, the agent's practical conception of the inevitable outcome of her behaviour in bringing about X shall include Y—she cannot conceive of bringing about X alone.¹⁰⁰

Hence, what matters to Simester is that *to the agent*, *b* is conceptually entailed by *a*. Simester offers two instances where an effect is "inseparable" and therefore also intended: when the effect is either an instantiation of meaning or an instantiation of expectation.

Simester claims that an intention to do one act is inseparable from an intention to do another act when the former is merely a specific instance of the latter. Thus, decapitation is an instance of killing conduct; going to Manchester is an instance of getting out of London; killing Sally is an instance of killing a person.¹⁰¹ Simester does not claim that these intentions are the same intention (which would violate Moore's rules) but rather that one is simply a specific instance of the latter.¹⁰² Thus, if one intends a specific description of one's conduct, then one also intends the more general description.

Simester also advances the idea of instantiation of expectation. The "idea of an actual, instantiated expectation explains the distinction both in general and in the inseparable cases where that distinction cannot be drawn."¹⁰³ Recall Bennett's variation of the Terror Bomber where the Terror Bomber does not care if the children actually die, he only wants them to appear dead. Simester balks. As he notes, "[w]e are

⁹⁸ Simester, *supra* note 10, at 458.

⁹⁹ HART, *supra* note 1, at 120.

¹⁰⁰ Simester, *supra* note 10, at 459.

¹⁰¹ *Id.* at 460-61.

¹⁰² *Id.* at 459-60 ("[T]here is a third type of reason which an agent may have for wanting to do some action. While the action may be desired for its own sake or as a means to an end, it may also be wanted as a practical instance of an end.").

¹⁰³ *Id.* at 463.

concerned with an agent's conception of her *actus* in the world as she understands it, and not in some logically-possible world existing only as her conjecture."¹⁰⁴ Simply put, the Terror Bomber knows that bombs kill people. The people are dead; not kind of dead; mostly dead; or only apparently dead.¹⁰⁵ This dream of the Terror Bomber's is just a dream, and so long as it is just a dream, he no more intends to "just make them look dead" then he intends "to drop a bomb and magically appear in Tahiti."

Hence, according to Simester, Williams' surgeon understands himself to be killing the patient by removing his heart. Simester reminds us that he is not claiming that the heart removal is the same thing as killing the patient. Rather, the agent perceives the two as intimately linked and this is sufficient for an intention to do one to constitute an intention to do the other.

To summarize, the internal account focuses on *the agent's* view of the relation between *a* and *b*. Moore claims we are trying to identify when we are talking about two intentions and when we have only one. Simester, on the other hand, does not require that we individuate intentions. Rather, two intents are, for all intents and purposes, the same when either (1) one is a more specific instance of the latter, or (2) the agent knows that in the world as she understands it one result of her actions cannot be severed from the other.

Curiously, the two thus disagree on the answers to the lobster and decapitation hypotheticals. Moore claims that an intention to order the lobster is an intention to order the most expensive thing on the menu.¹⁰⁶ Simester does not view the description, "the most expensive thing on the menu," as intended as it is not an instantiation of "ordering the lobster."¹⁰⁷ On the other hand, Moore claims that Williams' eccentric surgeon's intention to remove a heart is not an intention to kill because of the asymmetrical causal relationship;¹⁰⁸ whereas, Simester claims that

¹⁰⁴ *Id.* at 464.

¹⁰⁵ In other words, we do not live in the kingdom where the film, *The Princess Bride*, takes place. Billy Crystal's character, Miracle Max, is not available to revive the "mostly dead."

¹⁰⁶ Moore, *supra* note 22, at 261 (discussing Garcia, the fifty-year-old man).

¹⁰⁷ Simester, *supra* note 10, at 462 ("This is not a case of instantiation, for the thing intended is not the more specific. Rather, it is an example where the action which is intended has been partially elaborated upon by specifying circumstances accompanying *x*'s conduct. In such cases it cannot be said that the agent intends that the circumstances pertain—he is merely aware of it. . . . [T]he most that we can say about *x* is that 'he intends to order lobster tails, the most expensive thing on the menu', or that 'he intends to order lobster tails, which is (as he knows) the most expensive item on the menu.'").

¹⁰⁸ Moore, *supra* note 22, at 260 ("Asymmetrical causal relations exist between: heart-removals, and deaths; blowing up a plane in flight, and the deaths of any passengers on it; getting drunk, and being hung over; retaining another's car, and depriving him of his use of it; decapitation, and death. In each of such cases, there are distinct types of events, and an intent to bring about the first is *not*, accordingly, an intent to bring about the second.").

the expectation of heart removal is death and thus the death is intended.¹⁰⁹

With these positions in place, let us push this account of meaning and mind further. I submit that in both hypotheticals above the inseparable effect is intended. It is my contention that our use of simple linguistic descriptions leads us astray in this analysis. That is, because we reduce intentional objects to language, we often shorthand the truly robust nature of our thought.

IV. INTENTION AND THE NORMATIVITY OF THOUGHT

A. *A Multi-Dimensional View of Intentions*

Our inquiry thus far has assumed that the question is—when an actor intends *a*, and knows *a equals, or leads to b*, does the actor intend *b*? To approach this problem in this manner, starts from a false premise—that the actor is only thinking about *a* in the first place. Yet, as we learn from Moore, an intention to *a* is not equivalent to an intention to *b*; it *is* an intention to *b*. Simester likewise claims that when an agent intends a specific instance, he intends the more general. What these views presuppose is how an agent's thoughts are systematically connected. Let us unpack this a bit more.

Consider the following hypothetical from Michael Luntley.¹¹⁰ He imagines that in the middle of a crowded, rowdy meeting, he says, "That heckler should be ejected." Luntley then supposes that the reader asks him a series of questions.¹¹¹ Do you mean the man behind the guard?¹¹² Do you mean the man with the red hair?¹¹³ Yet, instead of answering these questions, Luntley just shrugs, insisting that he only means the heckler should be ejected.¹¹⁴ The reader has "offered a series of thoughts to which you took the truth of my original claim to be sensitive, and I refuse point-blank to acknowledge any such

¹⁰⁹ Simester, *supra* note 10, at 464-65 ("Glanville Williams' surgeon is aware that removal of his patient's heart will leave the patient without a heart and, as such, dead. His practical conception of a heartless patient is inseparable from recognition that the patient is dead; bringing about the death of his patient is an aspect of the action that the surgeon understands himself to be doing."); accord David Heyd, *Comment*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY *supra* note 22, at 271, 273 ("Thus we can say that heart removals *are* killings and that hitting is disfiguring (at least in certain circumstances).") (emphasis in original).

¹¹⁰ MICHAEL LUNTLEY, CONTEMPORARY PHILOSOPHY OF THOUGHT: TRUTH, WORLD, CONTENT 236 (1999).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

sensitivity.”¹¹⁵ The result? “In the face of my attempt to hold my original claim insensitive to such further thoughts, it is tempting to wonder whether I could have really meant anything at all by my original claim.”¹¹⁶

Notice Luntley’s point here. When he uses the phrase “the heckler,” it must be sensitive to the truth of other claims/descriptions about “the heckler.” Indeed, the heckler must be referring to someone. When Luntley uses the term “heckler” it refers to a person about whom he is thinking. This person has a hair color, is sitting somewhere, etc. Thus, questions about these alternative descriptions, should yield a yes or no answer. As Luntley explains:

The fundamental insight [that drives the whole conception of sense and reference] is that if you could factor out grasp of the sense of a singular term from grasp of the sense of whole sentences, you would have no account of the rational power of the sense of the singular term. Thinking of an object is normative. To think of an object is to have your cognitive attitude to it subject to normative rational evaluation. The normativity of thought consists in the way a thought is systematically connected to others.

....

The suppositions that I have considered are all ways of revealing the way in which thought about an object must be sensitive to a cluster of thoughts that, as it were, provide the triangulation that fixes thought on a particular. You cannot, for example, demonstratively think about an object without having some idea of how it stands above, behind and to the side of other things, for if you did not have some idea about that, you would have no idea of its space-occupancy at all.¹¹⁷

The key to understanding intentions is the following claim of Luntley’s: “To think of an object is to have your cognitive attitude to it subject to normative rational evaluation. The normativity of thought consists in the way a thought is systematically connected to others.” What this claim tell us is that an intention to *a* does not simply amount to the words we use to describe *a* but to all the other descriptions that the actor attributes to *a*. After all, “heckler” is just a word. But, if we suppose that Luntley is not uttering a nonsensical sentence, then, to the actor, “heckler” must have content.

Hence, when we talk of mental states and their intentional objects, we shorthand the truly robust nature of our thought. We use language—and thus one description—to communicate with each other, but the actual content is much richer. Assume one leaves her house with the

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

purported intention of going to “the store.” “The store” is not simply eight letters. It is not simply two words. Rather, it has content. It is answerable to a number of questions. Do you mean the 7-11 or the Safeway? Do you mean the one off of Route 23 or the one by the dry cleaner? “The store” has a rich content far beyond the eight letters one selects to describe her intentions.

This is Luntley’s point. If he thinks that “the heckler” should be ejected, he must mean something by the term. To mean anything by his utterance, he must have some sense of where the heckler is sitting, what hair color he has, and so forth. If Luntley refuses to answer any question that gives meaning to that term, the entire sentence ceases to make sense.

With Luntley’s teachings about the normativity of thought in mind, let us turn our attention to one of our “inseparable effects” problems—the lobster tails. Let us assume that I go to a restaurant and decide to order the lobster tails. My companion asks me, “What do you intend to order?” I reply, “The lobster tails.” This claim, as Luntley shows us, must be sensitive to other questions, which yield alternative descriptions of “the lobster tails.” Thus, my companion might ask me whether I mean “the most expensive item on the menu,” “the special,” “the meal I ordered last time that was so delicious,” “the lobster tails that come on the big red plate,” and my intended meal must be sensitive to whether these other claims are also true of the object that I intend to order. Of course, this is not to say that I may have thought about or have been aware of all the possible permutations, but rather, that an intention to order the lobster is more full-bodied than the singular phrase used to express it.

Moreover, Luntley’s claim is not simply that I choose to order the most expensive thing on the menu when I choose to order the lobster. Rather, his claim is that “thought about an object must be sensitive to a cluster of thoughts.” For me to be rational, an intention, for example, to eat “the lobster tails” must be sensitive to where the lobster tails are on the table—in front of me, on a plate, etc.—that is, “how it stands above, behind and to the side of other things.” So, when I think about the lobster tails, this thinking is sensitive to several different descriptions of the very same item, all of these descriptions inform my thinking about the item.

Thus, when we speak of “lobster tails,” these words are shorthand for an object. This object, with all of its descriptions, is represented by these simple words. What we intend to order is not two simple words but the object that those words represent.

Hence, it is our use of language that leads us astray. We think that we can reduce an intentional object to one description, and then question whether other descriptions also apply. This is the wrong

question for it falsely presumes that intention is simply focused on one linguistically simple description of the intentional object.¹¹⁸ Therefore, Simester and Audi are wrong in their assessments that to intend to order the lobster tails is not to intend to order the most expensive thing on the menu. The problem lies in oversimplifying the intention as one simply to order the lobster tails. Our discussions lead us awry as they favor one-dimensional linguistic intentional objects, failing to realize that our thought about objects is multi-meaning and multi-dimensional.¹¹⁹

B. *Questions About the Content of the "Cluster of Thoughts"*

At this point, I should address four potential questions. First, what level of awareness of the alternative sense is necessary before this alternative sense is part of the "cluster of thoughts"? Second, where do we look to determine when two things mean the same thing to the actor and are therefore part of this cluster? Third, if Luntley is correct are two mental states ever the same? Finally, are there times when thoughts are not sensitive to this "cluster effect"?

We have assumed throughout that the agent is aware of the alternative description. This project has never sought to equate *a* with *b* where the agent is unaware of *b*, nor would such an approach be appropriate.¹²⁰ Yet, how cognizant of the many meanings of her intentional objects must the actor be?

Recall Michael Moore's claim that one sense must be "vivid" to the actor before it may be equated with another sense.¹²¹ Assume for a moment that the last time I ordered the lobster at the restaurant, the waiter told me that the lobster is always shipped from Maine. Now, if I have forgotten this fact, I certainly do not intend to order the lobster under this description. Our account of intention focuses on thought, and I am not thinking about it at all. But must I be consciously aware of the

¹¹⁸ I am not making the metaphysical claim that intentional objects must relate to real-world referents. For example, my claim is not that, if Julie desires a boat, there is actually a boat to which this desire refers. My claim is far narrower. First, that if there is a real boat that Julie wants, it does not just mean "boat" to her. It is a sailboat, a motorboat, etc. It has a color. Second, even if Julie does not want a particular boat, chances are that "boat" still has many meanings to her (the possibility that it does not is discussed *infra* Part III.B).

¹¹⁹ Hence, Chisholm's principle of the diffusiveness of intention is correct insofar as we are dealing with objects. For example, Chisholm correctly notes:

Thus, if a man acts with the intention of bringing it about that he drive off in the car that is parked on the corner and if he knows that the car parked on the corner belongs to another man, then he acts with the intention of bringing it about that he drive off in the car that is parked on the corner and belongs to another man.

CHISHOLM, *supra* note 16, at 75.

¹²⁰ For a discussion of how mental states are referentially opaque, see Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597, 603-06 (2001).

¹²¹ Moore, *supra* note 22, at 261.

fact that it is from Maine before this aspect of the description informs the identity of my intentional object? Must I deliberate about it?

In my view, for senses to substitute they must exist either in the actor's conscious deliberations or in his preconscious.¹²² That is, the defendant must have access to these meanings at the time she is making the decision. Returning to our earlier examples, when one is looking at the menu, one likely is aware of the price when ordering "it." When decapitating someone, one likely is cognizant of how likely it is that the victim will live without his head. In these sorts of examples, it is extremely unlikely that an actor can understand what he intends without conscious or preconscious awareness of these additional descriptions of her intentional object.

Our second question is: from where do we derive our theory of meaning? What is important to note is the change in the nature of the question. Until this point, the argument has been philosophical. We asked when an intention to *x* also constitutes an intention to *y*. As Moore and Simester recognized, the answer is that an intention to *x* is an intention to *y*, when *x* and *y* mean the same thing to the actor. Luntley further supports the multi-dimensionality of intentional objects because he shows us that a rational agent gives rich content to her thoughts. But for our theory of content, we look not to the objective meaning of words but to the actor's subjective account. This is a psychological, not a philosophical, question. It is the agent who links *a* and *b*.

A third concern is lurking nearby. If intentional objects have multiple meanings, it makes it unlikely that two people ever believe, intend, or desire the same thing.¹²³ Even if I believe that George Bush is the President of the United States and you believe that George Bush is the President of the United States, we may not believe the same thing. After all, I may think that George Bush is a terrible president, and you think him terrific, or vice versa. If my belief—"George Bush is President"—is a cluster and your belief—"George Bush is President"—is also a cluster, then, because our clusters are different, we do not believe the same thing.

I accept this implication, but am untroubled by it. We more or less believe the same thing. I agree with Jerry Fodor: this is not a question about epistemic commitment; that is, how certain we are that Bush is president. Rather, it is a question about matching contents. Fodor is troubled by this view—that two people can partially believe the same thing. As he says: "Yuck! There is, in my view, no sense to be made of

¹²² See Ferzan, *supra* note 120, at 635-41.

¹²³ JERRY A. FODOR, *PSYCHOSEMANTICS: THE PROBLEM OF MEANING IN THE PHILOSOPHY OF MIND* 57 (1987).

the suggestion that something might be almost—but not quite—the proposition that [George Bush is President of the United States].”¹²⁴

I don’t like my philosophy of mind yucky anymore than I like my criminal law sloppy. Rather, it seems to me that the question is one of overlapping circles of meaning. At some point, communication is possible because we both know who George Bush is and what a President is. There is an agreement about the relevant facts. But to think that this is exactly the same belief removes the way in which we infuse our intentional objects with meaning. If I desire a chocolate ice cream cone but am allergic to chocolate, my desire is not the same as yours if you can eat chocolate unapologetically. There is a sufficient meeting of the minds—an overlap—but not a complete equality. Our philosophy of mind must recognize the holistic way that we understand intentional objects, and how they give meaning to even our most basic beliefs, desires, and intentions.

Finally, consider this last concern. What if the actor has not “filled out” her intention? One might decide to go to the restaurant because one is hungry. At this point in time, “food” may be an empty concept to the actor. She may realize that she will later have to engage in means-end reasoning as to what kind of food will satisfy her hunger, but that does not mean that the term “food” has an initial content.¹²⁵ I believe that this indeed is probable, and that at that time, the word “food” is just a linguistic placeholder that will ultimately be given content. My contention is that when it is given content, the placeholder disappears and is replaced not with a word but with a contextualized, multi-definitional, multi-dimensional object.

With these issues put to the side, I now address a somewhat more difficult issue: the extrapolation of my thesis from objects to actions. When can we say that two actions mean the same thing to the actor?

C. *Applying the Full-Bodied View of Intentions to Act Descriptions*

When is an intention to *a* the same as an intention to *b*? I argued in the previous Part that these intentions are the same when *a* and *b* refer to the same object in the mind of the actor. But when *a* and *b* do not refer to an object, such as lobster tails, but refer to an action, such as killing, we begin with the conceptual, and perhaps metaphysical, problem of identifying when two actions are identical.

¹²⁴ *Id.* at 58.

¹²⁵ See HARMAN, *supra* note 15, at 59 (noting that intentions can be open-ended); DAVIDSON, *supra* note 6, at 6 (“[I]t makes no sense to demand that my want be directed to an action performed at any one moment or done in some unique manner.”).

Los Angeles police officers are trained to shoot to stop. But stopping entails aiming a gun at a vital organ—so when they shoot, do they intend to kill? When a doctor separates two Siamese twins, and the death of one is the necessary by-product of saving the other, does the doctor intend to kill? Does a woman acting in self-defense against her abusive husband, who shoots to end the attack, likewise shoot to kill him?¹²⁶

In this section, I will begin with Michael Moore's solution, which relies on a theory of action individuation. Ultimately, I will part company with Moore and argue that action individuation is irrelevant to our enterprise. Then, I will argue that our ordinary usage of action descriptions informs the way that we think about, and distinguish, actions.

Michael Moore's account of intention individuation relies on a theory of action individuation. Action individuation is a difficult problem. Joel Feinberg notes the "accordion effect" of actions.¹²⁷ When I move my finger, I flick the light switch, causing the light to come on, which alerts a burglar downstairs. My one basic action—moving my finger—may be re-described to embody many of the consequences of that action, for example, turning on the light or alerting the burglar. How many actions have I done?

Consider two different approaches. The first is the Davidson-Anscombe view. Under their view, "there are no further actions, only further descriptions."¹²⁸ Hence, under this view, I do one action that can be re-described to include the consequences of that action.

Alvin Goldman disagrees. He claims that flicking a light switch and turning on a light are not the same action. Why? Because the relationship between the two is asymmetric and irreflexive.¹²⁹ That is, we cannot switch the order—I do not flick the switch by turning on the light (indicating an asymmetric causal relationship) and I do not turn on the light by turning on the light.¹³⁰ Hence, to Goldman, these items cannot be identical, and are therefore different actions.

According to Goldman, actions may be related by causal generation, conventional generation, simple generation, or augmentation generation.¹³¹ An example of causal generation is the relationship

¹²⁶ These three examples are suggested by Ian Leader-Elliot. Ian D. Leader-Elliot, *Negotiating Intentions in Trials of Guilt and Punishment*, in *INTENTION IN LAW AND PHILOSOPHY* 73, 84 n.31, 87 n.38 (Ngaire Naffine et al. eds., 2001).

¹²⁷ Joel Feinberg, *Action and Responsibility*, in *PHILOSOPHY IN AMERICA* 134, 134-60 (Max Black ed., 1964).

¹²⁸ DAVIDSON, *supra* note 6, at 61.

¹²⁹ ALVIN I. GOLDMAN, *A THEORY OF HUMAN ACTION* 5 (1970).

¹³⁰ *Id.*

¹³¹ *Id.* at 22-28.

between flicking the switch and turning on the light.¹³² Conventional generation is dependent on rules and practices, thus the relationship between moving one's queen and checkmating one's opponent.¹³³ Simple generation relies on outside circumstances, but not ones embodied in rules.¹³⁴ This is the relationship between Cinderella's coming home after midnight and her breaking her promise to her fairy godmother.¹³⁵ Finally, augmentation generation adds an additional fact or circumstance.¹³⁶ This is the relationship between waving one's arm and waving one's arm out the window.¹³⁷

Michael Moore's answer to the "inseparable effects" problem depends on a theory of action individuation. Recall that Moore claims that the "inseparable effects" problem is actually a problem of intention individuation. The question is simply whether an intention to *a* is also an intention to *b*. With regard to actual objects, I have largely adopted Moore's view. Intending to order the lobster is the same intention as ordering the most expensive thing on the menu.

Now, regarding actions, Moore claims that intending to strike a glass is not one and the same intention as intending to break the glass.¹³⁸ Why? Because the relationship is causally asymmetrical. Thus the event, "striking the glass," is not the same as the event, "breaking the glass." That is, "striking the glass" and "breaking the glass" do not have the same reference and extension. They do not *refer* to the *same* action.

I submit, contrary to Moore, that we do not need a theory of action individuation to determine whether an intention to do one act encompasses an intention to do another act. That is, we do not need to know whether these count as different acts or simply different descriptions of the same act. Let me explain.

Moore tells us that two event types are not the same and therefore do not constitute the same intention based on a theory of action individuation. But a theory of action or event individuation tells us nothing about whether *the actor* views these two events as identical. Moore shifts from being willing to substitute two things that mean the same thing to the actor, to imposing an external restriction on when two things *really are* the same thing.¹³⁹ This approach is flawed.¹⁴⁰

¹³² *Id.* at 22-24.

¹³³ *Id.* at 25-26.

¹³⁴ *Id.* at 26-27.

¹³⁵ *Id.*

¹³⁶ *Id.* at 28.

¹³⁷ *Id.*

¹³⁸ Moore, *supra* note 22, at 260.

¹³⁹ To understand what motivates the external restriction, consider the following hypothetical. Albert is at a dock, sees a ship, and says: "There is the ship *Peerless*. I intend to sail her tomorrow." Albert goes into a restaurant, the ship leaves the dock, and another similar looking ship docks. Albert comes out of the restaurant with some friends, points to the ship and says:

First, intentions are irrelevant to the description of actions.¹⁴¹ For an action to be re-described in terms of its result does *not* require that the agent be aware that she is acting under this re-description. That is, when I turn on the light, I may not know that there is a burglar in my home. Nevertheless, we may describe my action as “alerting the burglar.” Hence, ascriptions of responsibility, which are typically dependent upon the purpose or foresight of the actor, do not correspond to action descriptions.¹⁴² An action may be described in a manner for which we would not hold the agent responsible. Thus, how we describe actions is independent of the actor’s intentions.

Second, and conversely, external definitions are irrelevant to intentions. If Alice goes to the restaurant and orders the lobster tails, hoping and believing that they are the most expensive thing on the menu, then Alice intends to order the most expensive thing on the menu. Indeed, even if the filet mignon is the most expensive item and lobster is relatively inexpensive, she still intends to order the most expensive thing. External realities are irrelevant. Thus, it does not matter whether intending to decapitate and intending to kill are ontologically the same action; the question is only synonymy.¹⁴³

“There is the ship *Peerless*. I intend to sail her tomorrow.” If one wants to say that Albert had two separate intentions because there were two different ships, then we must rely on external facts and not internal beliefs. (I owe this point and hypothetical to Michael Moore.)

In my view, Albert does not have two separate intentions, just one slightly irrational one. Albert believes he has one intention to sail one ship, and that is all that motivates him. Of course, there is the wrinkle that Albert does not recognize that he has referred to two different ships. But if I say (1) I intend to take my umbrella and (2) I intend to take *that* umbrella (which I believe to be mine but isn’t), the bottom line is that I have one misguided intention. And there is nothing problematic about simply describing the intention in this way, rather than parsing the intention in pieces based upon external criteria of which the actor is unaware.

¹⁴⁰ While I do not address this claim here, David Heyd, in commenting on Moore, claims that the usage of either propositions or actions as the object of intentions ultimately leads to vicious circularity. See Heyd, *supra* note 109, at 272 (“[M]y intention is individuated through its object, a proposition, which in turn is individuated through my intention.”). Heyd claims that “actions can function as individuating criterion only under descriptions which are themselves intentional in nature.” *Id.* at 276.

¹⁴¹ I should qualify this to say “most” actions. Some actions require a certain intention before a specific action description is appropriate. Thus, “dangling a string in water” only becomes “fishing” if the actor puts the string in the water because he wants to catch fish. See GOLDMAN, *supra* note 129, at 27.

¹⁴² Notably, however, for an event to constitute an action, it must be intentional under some description. See A COMPANION TO THE PHILOSOPHY OF MIND, *supra* note 64, at 65 (“Things agents do count as actions if they are done intentionally, or if what they bring about results from something done intentionally.”).

¹⁴³ See also Heyd, *supra* note 109, at 274 (“[T]he solid theory of action-individuation [is] quite useless for the theory of intention-individuation which is consequently trapped in circularity. Propositions, although usually considered to be mind independent entities, do not fare better than real actions as a means of identifying intentions. It is hard to see how the transparent view of an event—or object-individuation—can serve to individuate intentions which appear in typically opaque contexts.”).

When are two actions the same to the actor? Are there any general rules to guide us? Once again, this is a psychological question. However, our ordinary usage of action descriptions, and the way in which we do distinguish between an action and its result, informs how we conceive of our actions. This is not to say that ordinary language defines what constitutes an intention, but rather, ordinary language informs our understanding of concepts. Given that we commonly distinguish between an action we want and its side effect, it is clear that our ordinary usage teaches us to recognize such a distinction. That is, we are taught that an action and its side effect are logically and normatively distinguishable. This is not to imply that a rational agent will not recognize that one event will follow from another. Rather, it is to show that a rational agent may justly separate an action from its consequence. Hence, when our ordinary language recognizes that two things are distinct, we will likely *think* they are distinct.

Now, there are instances in which we will not distinguish between two acts. These are the very instantiations of meaning and expectation suggested by A.P. Simester. Hence, when an actor intends a specific type of killing, i.e., decapitation, he also understands himself to be engaged in killing. The instantiation of expectation analysis likewise follows. Certainly one may stab someone without killing them, but where heart removal, head removal, dropping a bomb directly on someone, etc. all must result in killing, an agent recognizes that these two events are intimately linked. Hence, we balk at Bennett's variation of the Terror Bomber precisely because we cannot envision an actor who can separate bombing children from killing children and this is because there is no way in the world as we know it to drop bombs on children without killing them. In other words, the reason why the "inseparable effects" cases seem so bizarre and irrational is because (when one has full knowledge of the facts), one would have to be irrational to think that one could separate one action from the other.

Finally, we should be careful to distinguish questions of logic from rationality. For example, D understands herself to be boarding a plane to get out of London. D knows the plane is going to Manchester. D intends to board a Manchester-bound plane. There is nothing problematic about this. Yet, then, if D intends to board a Manchester-bound plane, does D intend to go to Manchester? While logic tells us that the intention to do the first description necessarily implies the intention to do the latter, we must remember that this is a principle of logic. As Gilbert Harman reminds us logical deduction is not a form of reasoning.¹⁴⁴ There may be many conclusions that follow from

¹⁴⁴ HARMAN, *supra* note 15, at 28 ("Logic, the theory of deduction, is not by itself a theory of reasoning. In other words, it is not by itself a theory about what to believe (or intend); it is not a theory concerning how to change your view.").

principles, but that does not mean that the agent has reached that conclusion.¹⁴⁵ Thus, while a logical inference may give us reason to believe the latter description was also intended, this is not necessarily true. Logic is evidentiary of thought but not constitutive of it.

Hence, in a somewhat “chicken or the egg” manner, our ordinary language will inform how we conceive of actions. Given that we commonly distinguish between one act and its result, our thinking and reasoning will likewise make this distinction. Hence, we hold tight to the view that the Strategic Bomber does not intend the children’s deaths because we conceptualize of an action as separate from its result.

In rare cases, however, this distinction collapses. Regarding actions, Simester’s approach correctly articulates when an inseparable effect is also intended. First, there are cases where the actor intends only a more specific description of a general act. Thus, decapitation is nothing but “killing conduct.” Second, when an actor cannot rationally distinguish between an action and its result given the world as she knows it, these instantiations of expectation are likewise intended. The Terror Bomber cannot rationally conceive of dropping bombs on children without killing children.

Thus far I have argued that the answer to the “inseparable effects” puzzle lies in the *agent’s* understanding of her action. I have eschewed external criteria in favor of focusing on the intentional object as the agent understands it. I have further argued that *rational agents* do not think in terms of simplistic linguistic descriptions; rather, their thought is sensitive to a “cluster of thoughts” about the object. All of these descriptions are what the agent intends. Thus, we ask the wrong question when we ask if an intention to *a* is equivalent to an intention to *b*. Rather, if the agent understands descriptions *a* and *b* to pertain to the same objection, then an intention to *a* is one and the same intention as the intention to *b*.

My view ties together the insights of both Moore and Simester. I concur with Moore that the question is about the object of the actor’s intention. Moore, however, adopts a single linguistic description as the intentional object and relies on external referents to distinguish between intentions, whereas I have argued that the object of intentions is determined solely by the meanings the actor ascribes to his intentional object and that that intentional object is multi-dimensional—not a single linguistic description.

My approach is also quite similar to Simester’s, though I part company with him in two significant respects. First, Simester correctly sees that intentional objects are linked by the way the actor himself understands his intention, but Simester oversimplifies the inquiry,

¹⁴⁵ *Id.*

thinking that the only way that objects can be linked is by specific to general or act and inevitable result. Simester thus fails to see that an actor might also link the general to the specific or the specific to the specific. That is, an intention to pick up "this pen" is also an intention to pick up "this blue pen" and an intention to pick up "this blue pen" is also an intention to pick up "my favorite pen." Or, in the criminal law, if I intend to kill, "the man who owes me \$50" and I know that he is a police officer, I also intend to kill "a police officer." But killing a man who owes me money is not a specific instantiation of being a police officer. Rather, they are both specific descriptions that refer to the same intentional object. Because I understand "that man" as both my debtor and a police officer, both meanings are part of my intentional object.

Second, although Simester locates the linkage between intentions within the actor's own conceptual framework, he fails to ground his approach. That is, one may agree that Simester's test is almost right, but wonder where the test comes from. I believe I have supplied the answer to this question. It is the normativity of thought that explains the inseparable effects phenomenon.

In the next part, I describe how my theory of intentions challenges the conventional wisdom that intentions are co-extensive with motivational significance. I then apply my theory of representational content to criminal law's two categorization questions. I finally address how this new understanding of intentions challenges their normative significance.

V. BEYOND INTENTION

A. *The Severance of Intentions from Motivational Significance*

Intentions are not co-extensive with motivational significance. Rather, intentions have dual aspects. We intend something because there is a reason why that something is attractive to us. Intentions still involve motivational significance. But, as I have argued, intentions also involve a broader meaning component. Intentions are broader than simply motivational significance because they encompass the wealth of meanings an actor gives to her intentional object.

To illustrate, we must return to the lobster tails. If I decide to order the "lobster tails," I am making a decision about one object, which has many descriptions in my mind. These include: that the object is called "lobster tails" on the menu; that the item is the most expensive on the menu; that it will come served on a plate, etc. Now, only one of these descriptions of the same object may be the reason why I am ordering lobster. For example, I could be very hungry and I am told that the

lobster will be prepared quickly. Thus, I am ordering “the item on the menu that will come out quickly.” The fact that this item is lobster may be viewed by me as desirable; I may be indifferent to it; or I may find this fact about my food choice undesirable. In other words, I could not particularly care for lobster yet be so hungry that I order it anyway.¹⁴⁶

Do I intend to order the lobster? Consider Duff’s “test of failure.” If the waiter appears with salmon because it turns out that it was the quickest to prepare, then my goal—to order the food I can get the fastest—has been satisfied. Nevertheless, it is wrong to believe that I did not intend to order the lobster—a description of the item I ordered that is irrelevant to my success or failure.

Notice this means that the uncontroversial account of motivational significance as defining what is *intended* is too narrow. Certainly, I intend to order *this item*. The reason why is because I am hungry—not because the item is lobster or because it is expensive. Nevertheless, when I intend to order this object, I cannot segregate out simply one description. One description may be most salient to me, but all of the descriptions pertain to the very same object. Thus, I intend to order *the lobster* when I intend to order *the item that will be prepared fastest*.

Thus, our tests of intention break down here. We cannot simply say that I intended to order the item that would come out quickly because that is the same intention as the intention to order the lobster and the intention to order the most expensive thing on the menu. The answer to “why” may only pertain to part of the *whole*.

Hence, intentions are not simply about motivational significance. Built into our intentions is the normativity of thought. Thus, while intentions encompass the “why” of actions, they also include the broader meaning of that “why.” In sum, as a conceptual matter, the borders for intentions lie beyond motivational significance.

B. *Application to Criminal Law Matching Questions*

Having resolved questions of representational content by recognizing how intentions extend beyond motivational significance, we must return to criminal law’s categorization questions. In my view, it is this holistic understanding of intentional objects that explains how we can match what the defendant intended to what the criminal law prohibits and how we answer the normative question posed by proximate cause problems. However, our deeper understanding of the

¹⁴⁶ This is not a means-end analysis. I do not form the intention to order the lobster in order to order the fastest item. Rather, I form one intention—to order the quickest meal—which happens to be the lobster.

nature of intentions leads us to ask why intentions matter at all. I turn to that question in the next part.

The holistic account of intentions explains why we so easily match what a defendant intended to what the criminal law prohibited. It is because the defendant understands the object of his intention at many different levels of description simultaneously. The defendant simultaneously intends a very specific description of the harm and the general description prohibited by the criminal law.

Consider a case of murder. It is murder to *intend* to kill a human being. So, when an actor intends to kill Sally, he is held to intend to kill a human being. That Sally is a human being need not be one of his reasons for acting. It need not be motivationally significant. But we now understand that the defendant understands Sally to be a human being when he intends to kill her. Sally's status as a human being is part of his representational content. Likewise, a car thief is motivated to steal under the description of "something I can get \$4200 for," not "someone else's car," or, more importantly, "property belonging to another." Nevertheless, the law correctly recognizes that all of these descriptions mean the same thing to the actor, and despite the fact that only one description is motivationally significant, all of these descriptions constitute the very same intention.

Our new understanding of representational content also helps us begin to address the second categorization question inherent in proximate causation analysis. This is the question of how we are to determine whether the defendant did what he intended to do. Should we follow *Mohr* and distinguish a left from a right ear?¹⁴⁷ What if the defendant intends to put out the left eye, but hits the right eye? What if the defendant intends to kill Alice (a human being) but misses and hits Betty (a human being)? Can we simply say that the defendant did what she intended—i.e., she killed a human being?¹⁴⁸

Now, we know that what an actor intends extends beyond what is motivationally significant. The intention is both to injure Alice and to injure a human being. The intention to put out the left eye, is also an intention to put out an eye, is also an intention to maim. At the level of meaning, the defendant has done what he intended to do.

There is, however, a nagging sense that in broadening our understanding of intentions, we have lost some of their normative import. That is, if intentions do not distinguish between what is motivationally significant and what is not, then why should the law rely on them at all?

¹⁴⁷ See *supra* Part II.B.

¹⁴⁸ See DRESSLER, *supra* note 22, at 109 (arguing that the doctrine of transferred intent is unnecessary because all that is required is that the defendant intends to kill "a human being"); Moore, *supra* note 22, at 267-68 (same).

Hate crimes reflect the very problem with this broader aspect of intentions. There, we seek to punish the defendant because he is motivated by the victim's racial (or other) identity.¹⁴⁹ It is difficult to construct hate crime statutes. Part of the problem lies in the fact that intention does not fully capture this conduct. That is, if you intend to kill someone, and that person is a racial minority, then you intend to kill a racial minority. Thus, intention, as we have seen above, will not single out what is motivationally significant about the victim. Without intention to mark the boundaries of motivational significance, drafters of hate crime legislation are forced to look elsewhere.

In summary, a deeper understanding of representational content allows us to more readily answer the typical categorization questions of the criminal law. We can determine when what the actor intended is an instance of the type of intention prohibited by the law. We can also determine whether the defendant may be said to have done what he intended. At the same time, however, this broader understanding of intentions may undermine their very normative usefulness. It is to that argument that I now turn.

C. *Our Normative Usage of Intentions*

I have argued throughout this Article that a coherent account of intentions is central to both morality and law because intentions mark key boundaries—between the permissible and the impermissible, and between levels of culpability. Ironically, however, a coherent understanding of intention undermines this very role. In this final part of the Article, I argue that both law and morality cannot rely on intentions.

Let us begin with why intentions are supposedly so central to law and morality. It is because intentions are the windows to human agency. For example, John Finnis, a defender of the DDE, maintains that it is precisely the one act description that motivates the actor that is important for moral responsibility.¹⁵⁰ Why? Finnis replies, “[B]ecause free choice matters”:¹⁵¹

¹⁴⁹ Actually, there are two different potential usages for motivation here. One is that one may be motivated by something, as in the way that anger motivates—it does not form a reason for acting. The other sense of motive is that it is of motivational significance. See Douglas N. Husak, *Motive and Criminal Liability*, 8 CRIM. JUST. ETHICS 3, 5-6 (1989); see also Kent Greenawalt, *Reflections on Justifications for Defining Crimes by the Category of Victim*, 1992/1993 ANN. SURV. OF AM. L. 617, 622-623 (discussing the problem of what it means to want an attendant circumstance in the hate crime context). I refer to the latter instance above.

¹⁵⁰ As Finnis explains:

When defending oneself, it may of course be the case that one is intending to harm one's assailant as an end (satisfying one's hatred, spite, resentment, desire to get back one's

And the states of affairs which one commits oneself to bringing about—one's instrumental and basic purposes—are precisely those identified under the intelligible description which made them seem rationally appealing and choosable. And what one thus adopts is, so to speak, synthesized with one's will, i.e., with oneself as an acting subject; one *becomes* what one saw reason to do and chose and set oneself to do—in short, what one intended.¹⁵²

Finnis, however, relies on a conception of intentions as co-extensive with motivational significance. However, if intentions are not co-extensive with motivational significance, as I have argued, what effect does this insight have on the utility of intentions for normative inquiries?

Clearly, this insight raises a significant concern. The problem is that intentions give meaning to an actor's actions because we care why an actor did what she did. It is the motivational significance that typically matters to us. At the end of the day, I believe that understanding the robust nature of intentions undermines the normative role that intentions can play.

Admittedly, our narrow employment of intentions as co-extensive with motivational significance gets the answer right the vast majority of the time. But it is an imperfect conception that comes with costs. One problem with our current employment of intentions is that intentions appear incoherent and context-dependent.¹⁵³ Some theorists argue that intentions simply mask political judgments. We now see why this appears to be so. If we can simply jump back and forth between the narrow view of intention as motivational significance and the broader holistic view, then judges and juries are not bound by rules, but by other inappropriate value judgments.

own) or as a means (of deterring the assailant or potential assailants, or of disablement of some future revenge attack). But if one has none of those intentions, then one's *intent* can and should be simply to *stop this attack* by whatever means of stopping it are at hand. All the harm to the assailant, including the harm one foresees as certain, can be a side-effect, unintended.

John Finnis, *Intention in Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 229, 246-47 (David G. Owen ed., 1995).

¹⁵¹ Finnis, *supra* note 10, at 61.

¹⁵² *Id.* at 61-62.

¹⁵³ See Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 35 *STAN. L. REV.* 591, 620-33 (1981) (discussing criminal law's fluctuation between broad and narrow views on intent); see also Nicola Lacey, *A Clear Concept of Intention: Elusive or Illusory?*, 56 *MOD. L. REV.* 621, 622 (1993) (discussing the reductive skeptic who views "legal concepts such as intention . . . to mask retrospective rationalizations of substantive value judgments which courts or commentators want to make"); Alan W. Norrie, *Oblique Intention and Legal Politics*, 1989 *CRIM. L. REV.* 793, 806-807 ("The logic of *mens rea*, in other words, runs counter to the logic of legal politics. . . . [W]e should cease to see the law as potentially founded on rationality and principle. Rather, it is the site of a struggle between separate and contradictory rationalities and conflicting aims and principles.").

Second, if we face the holistic nature of intentions, we can resolve difficult statutory drafting questions that currently befuddle us. In particular, we have difficulty formulating statutory definitions of certain crimes where the critical element is an attendant circumstance and delineating how that attendant circumstance is relevant. Too often we employ intention as a definitional stop, failing to address which of the actor's mental states is actually doing the normative heavy lifting. With our new understanding of intentions, we can more readily address the significance of attendant circumstances to hate crimes, and the need to have a way (beside intention) to mark out the significance of the victim's racial identity.

Our view of intentions may also help us with rape law. How should we understand the relationship between the attendant circumstance—lack of consent—and the actus reus? Antony Duff argues that “even if her lack of consent is no part of [the defendant's] reason for action (it is, for him, simply a known but irrelevant fact), we would still surely count it as part of what he *intends*; he intends ‘to have intercourse without her consent.’”¹⁵⁴ Now, that we understand the dual aspect of intentions, we know what the real inquiry is. We must ask whether the actor must be motivated by lack of consent or simply know that he does not have lack of consent. Intention, as a definitional stop, cannot do this work.

The problem with intentions is unavoidable. While other theorists may question reliance on intentions, their critiques have been external. That is, taking the content of intentions as a given, they have argued that intentions should not play an important role in our normative discourse. These are the arguments that the DDE gets the wrong result, or that intention is as culpable as knowledge.¹⁵⁵

This critique is different. It is internal. My argument is that intentions cannot be relied upon to distinguish reasons from side effects because intentions are broader than previously assumed. If intentions are not what we presuppose them to be, we must question whether we can still rely on them to set normative boundaries. If we wish to draw the line at motivational significance, intentions cannot perform this function.¹⁵⁶

¹⁵⁴ DUFF, *supra* note 1, at 88.

¹⁵⁵ E.g., Claire Finkelstein, *The Irrelevance of the Intended to Prima Facie Culpability: Comment on Moore*, 76 B.U. L. REV. 335 (1996); *see also supra* notes 44–45.

¹⁵⁶ In private conversation, Jeff McMahan suggested to me that perhaps my argument is congenial to the DDE because it gives the DDE a principled boundary for intentions, thus offering a response to the Bennett objection. The question for the moral philosopher, then, is why under this new understanding of intentions, intentions have normative bite. For McMahan's revision of the DDE, in a way that might be married to the account offered here, *see* Jeff McMahan, *Revising the Doctrine of Double Effect*, 11 J. APPLIED PHIL. 201 (1994).

The nature of intention prevents us from stipulating a different, “legal” definition. Indeed, the very multi-dimensionality of intentions on which we rely to match a defendant’s intention to a criminal prohibition prevents us from narrowing intentions to motivational significance. If intentions are truly only what motivate us, then we cannot say that a defendant who intends to kill Sally satisfies a murder statute prohibiting intending to kill a human being. After all, Sally’s status as a human being may not be remotely motivationally significant to the actor. The advocates of intention are caught between Scylla and Charybdis. Now that we understand intentions, we must abandon them. Because intentions are not co-extensive with motivational significance, we would do better if our laws and our normative discourse focused directly on motivational significance (when relevant) and stopped relying on intentions.¹⁵⁷ Looking to intention obscures the critical inquiry.

CONCLUSION

This Article moves “beyond intention” both conceptually and normatively. First, it rejects the traditional boundaries for intentions—the view that intentions are co-extensive with motivational significance. The problem of inseparable effects reveals the deficiency of our conception of intention as motivational significance, as this view cannot account for when effects are so intertwined with intentions as to be intended themselves. We can unravel this paradox by recognizing that our thinking is normative. Our thoughts are sensitive to other meanings of our intentional objections—we think holistically. We have been led astray by viewing intentions as one-dimensional, ignoring the robust nature of our thought.

Second, this Article moves beyond intention normatively. Because intentions are broader than motivational significance, they are not the windows to human agency. Moreover, any attempt to refine our legal understanding of intentions as motivational significance would come at the expense of their utility—we would not be able to apply broad laws to specific facts. Instead of altering the boundaries of intentions, we

¹⁵⁷ This is not to say that motivational significance is not without its problems. For instance, although I may engage in an action (i.e., telling a story), consciously believing that I am telling the story for one reason, I may, upon later reflection, discover that my “real” reason was something else (for example, to annoy a coworker who hated the story). Thus, our motivations—even in the sense of reasons for acting—may sometimes be opaque to us. For the criminal law, I think the critical question is whether these sorts of motivations stand on equal (culpable) footing as those instances in which one is fully cognizant of the motivation. I will not attempt to answer that question here. (I thank Jeremy Horder for raising this concern.)

must move beyond them. Intentions should not be relied upon to mark normative boundaries of permissibility or culpability.

